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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 173.

MARIAN J. LOONEY, ADMINISTRATRIX OF THE ESTATE OF JAMES F. LOONEY, DECEASED, PLAINTIFF IN ERROR,

vs.

THE METROPOLITAN RAILROAD COMPANY AND THE WASHINGTON RAILWAY AND ELECTRIC COMPANY.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED JANUARY 31, 1905.

(19,622.)

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In the Court of Appeals of the District of Columbia

MARIAN J. LOONEY, Adm'x, &c., Appellant,
vs.
THE METROPOLITAN RAILROAD COMPANY ET AL. } No. 1418.

a Supreme Court of the District of Columbia.

MARIAN J. LOONEY, Administratrix of the Estate of James F. Looney, Deceased, Plaintiff,
vs.
THE METROPOLITAN RAILROAD COMPANY and The Washington Railway and Electric Company, Defendants. } No. 45405. At Law.

UNITED STATES OF AMERICA, *District of Columbia*, } *ss*:

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:—

1 *Declaration, &c.*

Filed May 21, 1902.

In the Supreme Court of the District of Columbia.

MARIAN J. LOONEY, Administratrix of the Estate of James F. Looney, Deceased, Plaintiff,
vs.
THE METROPOLITAN RAILROAD COMPANY and The Washington Railway and Electric Company, Defendants. } Law. No. 45405.

The plaintiff, administratrix of the estate of James F. Looney, deceased, sues the defendant-, The Metropolitan Railroad Company, and The Washington Railway and Electric Company (said last named company being, at the time of the grievances hereinafter set forth,

known as the Washington and Great Falls Electric Railway Company); each of said defendants being a corporation organized under the laws of the United States and each of them sometimes hereinafter for brevity respectively called the Metropolitan Company and the electric company, for that whereas heretofore, to wit, on the twenty-eighth day of July 1901, the defendants were each carrying on, in the District of Columbia, the business of a common carrier of passengers for hire on, over and along, railway lines or tracks wholly or partly within the said District, and each using, in the prosecution of their business, passenger cars propelled by electricity, the said Metropolitan Company using what is commonly known as an underground electrical system, and the electric company using what is commonly known as an overhead or trolley system; and the plaintiff says
2 that at the time aforesaid there existed a certain other corporation doing business in the District of Columbia, known as the Washington Traction and Electric Company, sometimes hereinafter for brevity called the traction company; and that there existed an agreement, arrangement or understanding between the said Metropolitan Company and said electric company and the said traction company, whereby the cars, or certain of them, of the Metropolitan Company might use and run on, over and along the tracks or lines of the Great Falls Company by a method of changing or adjusting the propelling machinery of said cars from an underground to an overhead or trolley system; and for the purpose of making said change there was located on the line of the electric company near the junction of Thirty-sixth street and Prospect avenue in said District, a certain excavation or pit, commonly known as a plow pit, said pit being intended to enable workmen, who were known as pitmen, to enter therein in order to change or adjust, from beneath such of the cars of the Metropolitan Company, as were intended to be used for running on and along the tracks of the electric company, the propelling machinery of said cars so as to enable said cars to be propelled by the electric current of said overhead or trolley system; and the plaintiff says that by said agreement, or in pursuance of a further agreement, arrangement or understanding between said defendant corporations, and said traction company, the latter company at and about said time, and as often as needed, furnished certain of its employees as might be necessary, known as pitmen, to work in said plow pit and make the change or adjustment aforesaid; and the plaintiff says that at the time aforesaid the plaintiff's intestate was then in the employ of said traction company as a pitman and was di-
3 rected by said traction company, in pursuance of said agreement, arrangement or understanding with said defendants, to enter said plow pit and to make the change or adjustment aforesaid, and thereupon, and before said intestate entered said plow pit, it became the duty of the defendants, and each of them, to keep, or cause to be kept, the electric current so cut off from said pit, as not to injure the said intestate; and the plaintiff says that

said intestate having entered said pit in obedience to said direction to him as aforesaid, said defendants negligently failed to keep, or cause to be kept, cut off, as aforesaid, said electric current from said pit while said intestate was therein for the purpose aforesaid, whereby and by reason of said negligence, the said intestate was so severely shocked and injured by said electric current that he almost immediately died; and the plaintiff says that the said injury, resulting in said intestate's death as aforesaid, was such that if death had not resulted therefrom, he would have been entitled to recover damages from the defendants; and the plaintiff further says that said intestate left surviving him a widow and next of kin, to wit, one child aged nine years, who have suffered great pecuniary loss by reason of his death. Wherefore the plaintiff, by reason of the premises and the statute in that behalf enacted, has become entitled to recover damages of the defendants to be assessed for the benefit of said widow and next of kin, and the plaintiff, therefore, claims from the defendants the sum of ten thousand dollars ($10,000.) to be assessed as aforesaid together with costs.

2d count. The plaintiff, administratrix of the estate of
4 James F. Looney, deceased, sues the defendants, The Metropolitan Railroad Company, and The Washington Railway and Electric Company (said last named company being, at the time of the grievances hereinafter set forth, known as the Washington and Great Falls Electric Railway Company); each of said defendants being a corporation organized under the laws of the United States, and each of them sometimes hereinafter for brevity respectively called the Metropolitan Company and the electric company; for that whereas heretofore, to wit, on the 28th day of July, 1901, the said defendants were each carrying on in the District of Columbia, the business of a common carrier of passengers for hire, on, over and along railway lines or tracks wholly or partly within the said District, and each using, in the prosecution of their said business, passenger cars propelled by electricity, the said Metropolitan Company using what is commonly known as an underground electrical system, and the electric company using what is commonly known as an overhead or trolley system; and the plaintiff says that at the time aforesaid the said Metropolitan Company used, by and with the consent of the said electric company, the tracks of the latter company for the purpose of running some of the cars of the Metropolitan Company on, over and along, the tracks or lines of the electric company by a method of changing or adjusting the propelling machinery, of said cars from an underground to an overhead system, and for the purpose of making said change there was located on the line of the Great Falls Company near the junction of Thirty-sixth street and Prospect avenue in said District, a certain excavation or pit, commonly known as a plow pit, said pit being intended to enable workmen, who were known as pitmen, to enter therein in order to change or adjust, from
5 beneath such of the cars of the Metropolitan Company as were intended to be used for running on and along the tracks

of the electric company, the propelling machinery of said cars so as to enable said cars to be propelled by the electric current from said overhead or trolley system; and the plaintiff says that at the time aforesaid the plaintiff's intestate was in the employ of said electric company as a pitman, and in the course of said employment entered said pit to make the aforesaid change or adjustment of said propelling machinery, whereupon, and because thereof, it became the duty of the defendants and each of them, to so keep, cut off, or cause to be so kept cut off, the electric current from said pit as not to injure said intestate while in said pit; and the plaintiff says that said intestate having entered said pit, as aforesaid, said defendants negligently failed to keep, or cause to be kept, cut off as aforesaid, the electric current from said pit while said intestate was therein for the purpose aforesaid, whereby, and by reason of said negligence, the said intestate was so severely shocked and injured by said electric current that he almost immediately died; and the plaintiff says that the said injury, resulting in said intestate's death, as aforesaid, was such, that if death had not resulted therefrom, he would have been entitled to recover damages of the defendants; the plaintiff further says that said intestate left surviving him a widow and next of kin, to wit, one child aged nine years, who have suffered great pecuniary loss by reason of his death. Wherefore the plaintiff, by reason of the premises and the statute in that behalf enacted, has become entitled to recover damages of the defendants to be assessed for
6 the benefit of said widow and next of kin, and the plaintiff, therefore, claims from the defendants the sum of ten thousand dollars ($10,000) to be assessed as aforesaid with costs.

3d count. The plaintiff, administratrix of the estate of James F. Looney, deceased, sues the defendant-, The Metropolitan Railroad Company, and The Washington Railway and Electric Company, (said last named company being at the time of the grievances hereinafter set forth, known as the Washington and Great Falls Electric Railway Company); each of said defendants being a corporation organized under the laws of the United States and each of them sometimes hereinafter for brevity respectively called the Metropolitan Company and the electric company, for that whereas heretofore, to wit, on the 28th day of July, 1901, the said defendants were each carrying on in the District of Columbia, the business of a common carrier of passengers for hire on, over and along railway lines or tracks wholly or partly within the said District, and each using, in the prosecution of their said business, passenger cars propelled by electricity, the said Metropolitan Company using what is commonly known as an underground electrical system, and the electric company using what is commonly known as an overheard or trolley system; and the plaintiff says that at the time aforesaid the said Metropolitan Company used, by and with the consent of the electric company, the tracks of the latter company for the purpose of running some of the cars of the Metropolitan Company on, over and along the tracks or lines of the electric company by a method

of changing or adjusting the propelling machinery of said cars from an underground to an overhead system, and for the purpose of making said change there was located on the
7 line of the electric company near the junction of Thirty-sixth street and Prospect avenue, in said District, a certain excavation or pit, commonly known as a plow pit, said pit being intended to enable workmen, who were known as pitmen, to enter therein in order to change or adjust, from beneath such of the cars of the Metropolitan Company as were intended to be used for running on and along the tracks of the electric company, the propelling machinery of said cars so as to enable said cars to be propelled by the electric current from said overhead or trolley system; and the plaintiff says that at the time aforesaid the plaintiff's intestate was in the employ of said Metropolitan Company as a pitman, and in the course of said employment, entered said pit to make the aforesaid change or adjustment of said propelling machinery, whereupon, and because thereof, it became the duty of the defendants and each of them, to so keep cut off, or cause to be so kept cut off, the electric current from said pit as not to injure said intestate while in said pit; and the plaintiff says that said intestate having entered said pit as aforesaid, said defendants negligently failed to keep, or cause to be kept, cut off as aforesaid the electric current from said pit while said intestate was therein for the purpose aforesaid, whereby, and by reason of said negligence, the said intestate was so severely shocked and injured by said electric current that he almost immediately died; and the plaintiff says that the said injury, resulting in said intestate's death, as aforesaid, was such that if death had not resulted therefrom, he would have been entitled to recover damages of the defendants; the plaintiff further says that said intestate left surviving him a widow and next of kin, to-wit, one child, aged nine years, who have suffered great pecuniary loss by reason of his
8 death. Wherefore the plaintiff, by reason of the premises and the statute in that behalf enacted, has become entitled to recover damages of the defendants to be assessed for the benefit of said widow and next of kin, and the plaintiff therefore claims from the defendants the sum of ten thousand dollars ($10,000.) to be assessed as aforesaid with costs.

4th count. The plaintiff, administratrix of the estate of James F. Looney, deceased, sues the defendant-, The Metropolitan Railroad Company, and The Washington Railway and Electric Company (said last named company being, at the time of the grievances hereinafter set forth, known as the Washington and Great Falls Electric Railway Company); each of said defendants being a corporation organized under the laws of the United States and each of them sometimes hereinafter for brevity respectively called the Metropolitan Company, and the electric company, for that whereas, heretofore, to wit, on the 28th day of July, 1901, the said defendants were each carrying on in the District of Columbia, the business of a common carrier of passengers for hire, on, over and along railway lines

or tracks wholly or partly within the said District, and each using in the prosecution of their said business, passenger cars propelled by electricity, the said Metropolitan Company using what is commonly known as an underground system, and the electric company using what is commonly known as an overhead or trolley system; and the plaintiff says that at the time aforesaid the said Metropolitan Company used, by and with the consent of the electric company, the tracks of the latter company for the purpose of running some of the cars of the Metropolitan Company on, over and along the tracks or lines
9 of the electric company by a method of changing or adjusting the propelling machinery of said cars from an underground to an overhead system, and for the purpose of making said change there was located on the line of the electric company near the junction of Thirty-sixth street and Prospect avenue in the said District a certain excavation or pit, commonly known as a plow pit, said pit being intended to enable workmen to enter therein in order to change or adjust, from beneath such of the cars of the Metropolitan Company as were intended to be used for running on and along the tracks of the electric company, the propelling machinery of said cars, so as to enable said cars to be propelled by the electric current from said overhead or trolley system; and the plaintiff says that at the time aforesaid the plaintiff's intestate was rightfully and lawfully in said pit to make the aforesaid change or adjustment of said propelling machinery; whereupon, and because thereof, it became the duty of the defendants, and each of them, to so cut off, or cause to be cut off, the electric current from said pit while said intestate was therein as not to injure said intestate while in said pit; and the plaintiff says that said intestate having entered said pit as aforesaid, said defendants negligently failed to keep, or cause to be kept, cut off as aforesaid the electric current from said pit while said intestate was therein for the purpose aforesaid; whereby, and by reason of said negligence the said intestate was so severely shocked and injured by said electric current that he almost immediately died; and the plaintiff says that the said injury resulting in said intestate's death, as aforesaid, was such that if death had not resulted therefrom, he would have been entitled to recover damages of the defendants;
10 the plaintiff further says that said intestate left surviving him a widow and next of kin, to wit, one child aged nine years, who have suffered great pecuniary loss by reason of his death. Wherefore the plaintiff, by reason of the premises and the statute in that behalf enacted, has become entitled to recover damages of the defendants to be assessed for the benefit of said widow and next of kin, and the plaintiff, therefore claims from the defendants the sum of ten thousand dollars ($10,000) to be assessed as aforesaid together with costs.

FRANKLIN H. MACKEY,
SIMON LYON, AND
R. B. H. LYON,
Attorneys for Plaintiff.

The defendants are to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of the service hereof, otherwise judgment.

FRANKLIN H. MACKEY,
SIMON LYON, AND
R. B. H. LYON,
Attorneys for Plaintiff.

Endorsed.

May 21 / 1902.—The clerk will file this case without pre-payment of costs.

JOB BARNARD, *Justice.*

11 *Plea.*

Filed June 23, 1902.

In the Supreme Court of the District of Columbia

MARIAN J. LOONEY, Administratrix of the Estate of James F. Looney, Deceased, Plaintiff,
vs.
THE METROPOLITAN RAILROAD COMPANY and The Washington Railway and Electric Company, Defendants.
} At Law. No. 45405.

The defendants, for plea to the declaration filed in the above entitled cause, say that they are not guilty as alleged.

J. J. DARLINGTON,
Attorney for Defendants.

Joinder of Issue.

Filed June 30, 1902.

In the Supreme Court of the District of Columbia.

MARIAN J. LOONEY, Administratrix of the Estate of James F. Looney, Deceased, Plaintiff,
vs.
THE METROPOLITAN RAILROAD COMPANY and The Washington Railway & Electric Company, Defendants.
} At Law. No. 45405.

The plaintiff joins issue on the plea of the defendant-.

FRANKLIN H. MACKEY,
WOLF & ROSENBERG,
SIMON AND R. B. H. LYON,
Attorneys for Plaintiff.

12 *Memorandum.*

November 4, 1903.—Verdict for defendant.

Supreme Court of the District of Columbia.

FRIDAY, *December* 4, 1903.

Session resumed pursuant to adjournment, Mr. Justice Barnard, presiding.

* * * * * * *

MARIAN J. LOONEY, Administratrix of the Estate of James F. Looney, Deceased, Plaintiff,
vs.
THE METROPOLITAN RAILROAD COMPANY and The Washington Railway and Electric Company, Defendants.
} At Law. No. 45405.

Upon hearing the plaintiff's motion for a new trial, it is considered that the same be, and hereby is, overruled, and judgment on verdict ordered: therefore, it is considered that the plaintiff take nothing by her suit, and that the defendants go thereof without day, and recover against the plaintiff their costs of defense to be taxed by the clerk, and have execution thereof.

The plaintiff notes an appeal to the Court of Appeals, and the penalty of the bond on said appeal is fixed in the sum of one hundred dollars.

13 *Memoranda.*

December 17, 1903.—Appeal bond filed.

Time in which to file transcript of record in Court of Appeals extended from time to time until April 1, 1904.

Supreme Court of the District of Columbia.

TUESDAY, *March* 15, 1904.

Session resumed pursuant to adjournment, Mr. Justice Barnard, presiding.

* * * * * * *

MARIAN J. LOONEY, Adm'x, Plaintiff,
vs.
METROPOLITAN R. R. CO. ET AL., Defendants.
} At Law. No. 45405.

Come here again the plaintiff and prays that her bill of exceptions submitted on February 16, 1904, which bill of exceptions was

taken during the trial of this case, may be duly signed, sealed, and made part of the record, now for then, which is accordingly done.

14 *Bill of Exceptions.*

Filed March 15, 1904.

In the Supreme Court of the District of Columbia.

MARIAN J. LOONEY, Administratrix of the Estate of James F. Looney, Deceased, Plaintiff,
vs.
THE METROPOLITAN RAILROAD COMPANY and THE Washington Railway & Electric Company, Defendants.
} Law. No. 45405.

Be it remembered that on the trial of this cause before Mr. Justice Barnard and a jury, the plaintiff offered evidence tending to prove that in and during the month of July, 1901, the defendant, The Metropolitan Railroad Company, was engaged in and carried on the business of a street railway in the District of Columbia, running its cars along F and other streets of the city of Washington, in said District, and having its western terminus at the junction of Prospect avenue and 36th street, in said city. That said defendant propelled its cars by what is known as an underground electrical system. That at the time of the accident, the pit in which the accident happened was in the road bed of the Washington and Great Falls Electric Railroad Company, and since the accident, the defendant, The Washington Railway & Electric Company has been organized of said Washington and Great Falls R. R. Co. and other companies, and uses the road-bed, where said pit was and is, and said Washington and Great Falls Co., was also engaged in and carried on the business of a street railway in said District, having its eastern terminus on said Prospect avenue at its junction with said 36th street, connecting with the western terminus of the Metropolitan Railroad Company at said point so that the cars of the first named company could be run along the tracks of the one and onto the tracks of the
15 other. That said Great Falls Railroad Company propelled its cars by what is known as an overhead electrical system, which consists of an overhead wire, running above the line of said railroad upon poles and connected with the cars by what is known as a trolley pole, so that when a current of electricity was generated and conducted along said line, said current could be carried into the motive machinery of said cars by means of said trolley pole being connected with said wire; that the quantity of electricity used in running said cars was five hundred and fifty (550) volts; that west of and near to the eastern terminus of said Great Falls road, and in and on its roadbed in Prospect avenue, there was what is com-

monly known as a "plow pit," the same being an excavation
structed in such a manner as to enable a workman, known as
man to enter therein and remove from beneath any car, constr
to run by means of the underground system of the Metropo
road, what is known as the "plow," so as to enable it to be prop
upon and along the line of said Great Falls railroad by said
head system.

The said Metropolitan car having a trolley pole to connect
said overhead wire, when running upon the tracks of the
Falls railroad.

"That the Great Falls road is a double track road and the ex
tion of the 'plow pit' is under both tracks and the space betwee
two tracks, so as to enable the pitman to pass from under one
to the other without coming to the surface. There was a trap
in each track the width of the space between the two rails o
track into which the pitman could enter and when open w
enable him to remove or adjust the plow."

That on the 28th day of July, 1901, the plaintiff's intestate, J
Looney, being an experienced pitman, and for the
16 being an employee of said Great Falls Company, en
said pit, through the southern trap door in the east-b
track for the purpose of removing the plow of any car coming
the line of the Metropolitan railroad upon the line of the
Falls railroad, so that said car might run along said last n
railroad by means of its overhead system, and also to adjust
plow to the cars leaving the Great Falls tracks to go on to the
ropolitan tracks.

That on said day, a car owned by said Metropolitan Rail
Company, the conductor of which car was named Dye, came on
along the track of said last named company, along 36th s
which runs at right angles with Prospect avenue, and turned
into Prospect avenue on to the track of the Great Falls road,
was propelled along said track until it was immediately over
pit.

That the plaintiff introduced as a witness in her behalf
MARGARET MAWSON, who testified that she lived, at the time o
accident, and also at the time of the trial, in house No. 3615
pect avenue, on the north side of said avenue 75 feet or more
of the pit in question; that at the time of the accident she was si
in her room on the second floor of said house and saw the car
around the curve from 36th street into Prospect avenue, and
the trolley pole was up and the trolley wheel against the over
wire, all the time after the car got into Prospect avenue, un
stopped over the pit; that while the car was coming from
street, down to the pit, she saw Looney, the deceased, enter th
through the south trap-door. That after the car stopped
the pit she saw him go up under the car and take the plo
That after he took the plow off, she saw him go up under

car again and put the wires up in the car to connect with the overhead trolley, and that while he was in that position she heard him holler and drop down, and the motorman turned
17 and said "For God's sake, fix that trolley" and the conductor then pulled the trolley down, but did not before that time. That someone said "Pull that car down; do not let the man die in that hole," and the car was pulled down in front of her house; that it was descending from 36th street, along Prospect avenue towards and past her house, so that the car would run without anything to propel it, and that it did on that occasion drift from over the pit down in front of her house without having the trolley put up to move it. That the accident did not happen until after the car stopped and the deceased had removed the plow and had gone up under the car again and was putting up the wires. That she saw the movements of the deceased under the car through the trap door. That she could see his hands taking off the plow; could see nothing but his hands then; that after he took off the plow and went up under the car, she could see a part of his body above the surface of the street. That the pit was deep enough for a man to stand up in; that she heard no bell ring, nor signal of any sort, her hearing was good enough to hear a bell if one had been rung.

The plaintiff also introduced as a witness, in her behalf, HELEN GERTRUDE COON, who testified that she was a daughter of the witness, Mawson, and lived in the same house with her. That at the time of the accident, she (witness) was sitting on the front porch of the house, which was about on the level with the sidewalk of Prospect avenue. That she saw the car, under which the accident happened, round the curve from 36th street, into Prospect avenue, and come down and stop over the pit. That she is not certain whether the trolley pole was touching the wires before the car stopped over the pit, but it was touching it or came in contact with it while
18 deceased was taking off the plow. That her attention was directed to the fact of the trolley being in contact with the wire from the fact that the deceased gave a groan, and the motorman said "For God's sake, pull that trolley down." That someone said "Pull the car off the pit." That she saw deceased take the plow off and then go up under the car to throw the overhead current on. That after he took the plow off and was putting the overhead current on, she heard him groan. That she heard no bells or signals given. That he had to use his hands to remove the plow and also put the overhead current on, and she saw him twist his hands when he got the shock. That she saw all this while looking under the car from where she was sitting on the porch. That they took the body up out of the pit over which the car had been standing. That she was sixteen years old at the time she testified. That she heard no bells ring.

The plaintiff also introduced as a witness in her behalf one, HOWARD E. TRUETT, who testified that he was a passenger on the car under which the accident happened and was sitting on the seat on the back platform with his face to the east. That he heard one bell ring and the car stopped and immediately the conductor took the rope that holds the trolley rod in his hand, but he did not notice him do anything else. That in about a minute and a half there was a groan down in the hole and he jumped down and ran to the south pit and saw the man was lying on his face. That he heard someone say "For God's sake hold the rod down; pull the pole down." That he could not see where the pole was. That he was under the roof on the back of the car. That he thought the deceased was lying under the north trap-door but could not tell how he was lying in the hole. That all he could tell about the position was that he was lying on his face. That they took him up
19 through the south trap-door.

That the plaintiff also introduced as witness in her behalf one, HARRY B. HARTUNG, who testified that he resides in house No. 3619 Prospect avenue, and did at the time of the accident. That he was in front of his house when the accident happened lighting the fire in his automobile. That he did not notice the car before it stopped. That while the car was standing over the pit he heard an exclamation but does not know who made it. That he heard a groan and some one said "Pull that trolley down." That after that exclamation was made he looked up and saw the trolley against the wire. That he was about 75 feet from the car. That when he heard the exclamation a crowd was gathering about the car.

The plaintiff also introduced as a witness in her behalf one, LEE HAZEL, who testified that he had formerly been in the employ of the Metropolitan Railroad Company and had worked for all of the companies, the Great Falls Company, the Tennallytown R. R. Co. the Brightwood Company and the Columbia Railway Company, as he was required to do. That he was employed by one man, the roadmaster for all the companies. That he had experience in removing and adjusting plows and wires to connect with the overhead trolley and had done it a good many times. That he repaired switches and conductor rails and slot rails, and had helped to put in conductor rails. The slot rails are the two little pieces of iron that run right along in the center of the track between which the upper part of the plow runs. That it never has any electricity in it, the conductor rail is the rail that is down in the excavation, that causes electricity. That the wires that are used to connect the motive power with the overhead trolley are called the "leads." That the "leads" are insulated by being covered with India
20 rubber, where you have to take hold of them to adjust them, but at the ends where they connect with the other wires, they are uninsulated and have to be so in order to take the current. That

if one takes hold of them at the right place and there is no leak, he would not be shocked, even though they were connected with the trolley. But if there was a leak, or, if the party adjusting them took hold of them at the points where they were uninsulated and the trolley was on, or should be put on while he was so holding them, he would be shocked, and if he was holding the leads tightly in his hands, his hands would be burned, but if he was holding them lightly they might not be. That wear and tear will cause a leak in the insulation. A leak is when the electricity comes through a hole in the insulation, caused by the wear and tear or from the insulation being old or imperfect.

That the company furnishes gloves in the pit with which to handle live plows and wires. But it is not customary or required to use the gloves except upon rainy days. On bright days, the car, when over the pit, is supposed to be "dead" and you don't take off the plows with gloves; you can't half do your work with them.

"That danger from electricity is increased from perspiration, rain or other moisture." That the day of the accident was a bright sunshiny day. The accident occurred between two and four o'clock p. m.

The plaintiff also introduced as a witness one, FREDERICK A. ANDERSON, who testified that he had considerable experience in the construction of electric railway systems, and was familiar with the action of electricity generally, and had had experience in superintending the work of disconnecting a plow from an electric car and ad-
21 justing the wires so as to move it by the overhead system and was familiar with it and the manner in which the work had to be performed. That the leads are insulated except at the end that goes into the connection. That if the trolley was on while handling the wires and there was a leak in the insulation, or if the man should touch the uninsulated ends, or parts of them, he would receive a shock, but would not unless the trolley was on the wire. That it was necessary to have a portion of the extreme ends of the wire uninsulated in order to catch the current from the connection. In answer to the question, on direct examination as to whether the deceased'- hands would have been burned if he had received a shock from the leads while they were in his hands, the witness said, that, if while the man's hands were on the wire the connection was broken at another point, that is, if the trolley was pulled down and his hands afterwards released, he would not receive a burn, but receive a shock. That he meant to say that a burn is received when the contact is broken, and if the man has hold of the wire with his hand, and his hand is pulled away, that is when the burn occurs. If the contact is broken elsewhere and his hand is afterwards pulled off, he receives no burn. That the idea he meant to convey is that a burn is caused when the contact is broken.

Supposing that the man fell and his hand was pulled away, if the current was still on his hand would show the burn; but if the

trolley, in the meantime, had been pulled down and he fell and his hand was pulled away, there would be no burn on his hand.

On cross-examination, the witness said that he meant to say that a live wire might come in contact with a man's skin and kill him and yet not burn him at the point of contact, but that he did
22 not know of any instance where any part of the body of a person had come in contact with a live wire and the person had received a shock sufficient to kill him without burning the part of the person where the wire was in contact. That in every instance that he knew of where a man was killed from the current, the break was made while the current was on the wire. That the statement that a person might be killed by a shock from a wire coming in contact with the person without receiving a burn at the point of the contact was a mere matter of theory with the witness.

The witness also gave it as his opinion as an expert that it would be the duty of the conductor or man in charge of the car to keep the trolley off the wire until he should receive some signal from the man beneath the car.

The plaintiff also introduced as a witness in her behalf, one WILLIAM KIRK, who testified that he was in the employ of the Metropolitan Railway Company for some four years while it was in the syndicate and worked for it and the other companies hereinbefore mentioned, and had often made the connections and was familiar with the method of doing the work, and his testimony in this regard was substantially like that of the preceding witness Hazel in relation thereto. He also testified that if the trolley was on before the plow was disconnected and removed the plow would be charged with the full voltage on the line.

The plaintiff also introduced as a witness one, DAVID H. ANDERSON, who testified that he had had considerable experience in the construction of electric car lines and in the operation of them and was familiar with the operation of removing plows to connect with lead wires in changing from the underground to the overhead system. That if the party doing the work had his
23 hands in contact with any bare portion of the wires or leads he would receive a shock, if the overhead trolley was on That the leak is sometimes caused from continuous use. That a portion of the leads are necessarily bare. That if the insulation was good and the party did not touch the bare part he would receive no shock, although the current might be on. That it is not necessary to touch the bare part in making the connection.

The plaintiff also introduced as witness one, THOMAS P. LARKIN who testified that he was employed by the Metropolitan Railway Company as a conductor for about eight years and left its employ about two and a half years ago. That it is understood that the conductor has charge of the car and says when it shall go and when it shall stop, and is held responsible for the conduct of the car.

The plaintiff also introduced as a witness, LARKIN W. GLAZEBROOK, who testified that he is a physician and surgeon and deputy coroner of the District of Columbia, and was such on the day of the accident; that he performed an autopsy on the body of the deceased on the 29th day of July, 1901; that he made a careful examination of the body to find whether there was any evidence of injuries upon it; that the only evidence of injuries he found was two wounds in the back on the right side just below the shoulder bone on the back of the body. They were burns, one of them was six inches long and the other just below was three inches long; that they were typical burns; that the muscles underneath showed hemorrhage, as a result from the wounds; that he also found the same appearance on his clothes corresponding to his wounds on the back; that he examined the body carefully and found him to be a man of good health and all his organs normal; that it would be impossible for him to say that the burns were caused by
24 any particular object; that he attributed his death, from the history of the case with which he was acquainted, to the burns which had occurred as the result of contact with live electric wires; that the top one of the burns reached almost to the shoulder blade to about an inch below the point of that bone and about two inches to the right of the spinal column; that the other burn was just below that and was about three inches long and was a little further from the spinal column than the longer one. The long one was about two inches from the spinal column; that the upper end of the shorter burn did not run up to the lower end of the longer one, but was about an inch below it; that the actual burn was about three-eighths to one-fourth of an inch wide; that the tissues around were somewhat redder for a little distance beyond; that it is hard to describe accurately the appearance or characteristics of electric burns, but there is a distinction between an electric burn and a burn from any ordinary object, such as falling into the fire or anything like that.

The burn appeared dry and the edges were seared—that is white. The burns were not deep. Electric burns, as a rule, are not; they are usually superficial. That in his judgment, they had all the characteristics of electric burns. That he found no other evidence of burns on any part of his body. There were none on the hands or any part of them, or any other part of the body. That he looked particularly for burns on the hands because they are naturally exposed parts, and there were none on the hands or any part of the arms.

Further evidence was given tending to show that the said Looney left surviving him, his widow, the plaintiff herein, and one child, a daughter, aged 11 years; that he was a strong, healthy man
25 aged 32 years, and was earning $1.50 a day at the time of his death; the plaintiff had been duly appointed by the supreme court of the District of Columbia administratrix of the deceased and that letters had been issued to her.

Plaintiff then called to the witness stand JAMES B. LACKEY, who testified, that he could not find any of the agreements referred to in the subpœna served on him. They never existed; that there never was any written agreement.

By Mr. MACKAY: I am not asking whether the paper is in existence or not or whether there is any written or oral agreement, and I refuse to be bound by any answer of that sort. I simply ask you whether you have brought these particular papers?

Mr. COLE: I submit that when he answers he has not brought it, he has a right to say why he has not brought it.

The COURT: I think the witness may explain his answer. You will not be bound by it if you can show there was such a paper; but he can make an explanation why he did not bring it.

Ans. It was suggested to me that if I did not bring these papers I would be in contempt of court. Of course, I know what that means and I think I have the right to explain why I did not bring these papers. I think I am entitled to say that if the papers existed I would have brought all the papers called for. None of the papers called for in paragraphs 1, 2, 3 and 4 of that subpœna ever existed, and none of them exist to-day and therefore I did not bring any one of them.

Mr. MACKAY: I submit that I am not bound by that answer.

The COURT: No.

26 Witness then testified that his present occupation is that of secretary of the Washington Electric and Railway Company and also secretary and treasurer of several other companies. That on July 28th, 1901, he was secretary of the Washington Traction Company, the Metropolitan Company, the Columbia Railroad Company, the Great Falls Company and several others. That he was also secretary of the Washington Traction and Electric Company. That the book which counsel for plaintiff then and there handed him and which had been produced by the witness in response to the subpœna is the general pay-roll. That he meant by general pay-roll, a list of the employés, showing the total amount due them by whatever company they worked for, and the heading in said book "Distribution of maintenance of way pay-roll, from July 1st to July 15th, inclusive," and also a like heading down to July 31st, meant, according to his understanding, the totals of the several amounts paid to the individual men by the several companies. In other words, if we pay John Smith $10. for the Columbia Railway Company, for the period during those 15 days that he worked for it, and pay him $3. for the Metropolitan and $1.50 for the Great Falls, those items are charged to the company he worked for, and the footing was the total amount.

By Mr. MACKAY: You say, if "we" paid. Who are "we"?

A. All the companies. At the time there were about eight com-

panies. *A.* Maintenance of way includes cleaning the tracks, greasing the curves, cleaning the conduit, switchmen and pitmen. The accounts would go through the hands of three or four people; the first person whose hands it goes through would be Mr. Shafer, who would make it up from his little book, but he does not write anything in this book—the pay-roll—that was done by some
27 clerk in the office; in the office of the several railroads.

By Mr. MACKAY: Where is that office?

Ans. At 14th and East Capitol streets. It is called the office of whatever company you want to deal with. It is not called the office of the holding company. It is commonly called in the city, the office of the Metropolitan railroad, but it is no more their office than the office of any other company. It is called that because it used to be their office. It is not the office of the Washington Traction and Electric Company; there is no such company. That company is out of existence. It never operated a street car in the District of Columbia and never had any authority to operate one. It was a stockholder in these roads.

By Mr. MACKAY: It held all the stock in these roads, or the larger portion of the stock, did it not?

A. It was nominally the owner. The stock was in the name of a trustee to secure the bonds.

Q. Of course, the stock was in the hands of trustees; but the Washington Traction and Electric Company was what is known as the holding company; was it not? A. It depends entirely on what you mean by the "holding company," I would interpret it to mean some company which was a stockholder of the stocks of several companies, which might be railroad companies or anything else.

Q. Who kept the pay-roll? You have the pay-roll there. A. A clerk in the general office of these railroad companies, or leave out the word "general" and say at the offices of these different railroad companies.

Q. Do you mean to say that they have a general office there without any arrangement that a general office should be had?
28 A. The treasurer and the secretary are charged with certain duties. Those duties may be identical in some respects, so that there is no reason why he should go around the corner and have another office if he can do the whole of his duty at one place. There are eight railroad companies represented there. I say treasurer and secretary as illustrations.

Q. Then there are eight different treasurers assembled at that office? Ans. No, sir, that is just what I have been explaining about the arrangement. There is one treasurer for all the companies and in acting as treasurer for them all he is treasurer individually for each one and is charged with the duties of treasurer for each company; but he does his work at one place;— at 14th and East Capitol streets. They perform their duties there, and each one does the work for the individual company at the individual office.

Q. Then who does the work at this general office that you spea
of? A. Nobody does it except those men that are in their emplo
Q. Then there are some clerks that work in the Metropolita
office, who do no work at the general office? A. I think we wi
cut out that word "general" because it has no meaning an
we will treat them as individual companies just as they are. Th
words "general office" are misleading in e way you are askin
the questions. We will now start and call them separate companie
Mr. Lackay is secretary of the Washington and Great Falls Com
pany and he has an office at 14th and East Capitol streets. He i
secretary of the Metropolitan Company and he has an office ther
and performs the duties of his office for these companies a
29 that place, and so with each and every officer who ma
have anything to do with anyone of the companies, in a
individual capacity, there being an individual secretary and a
individual treasurer for each individual company.

Q. Are you not secretary and treasurer of what is called th
"holding company"? A. There is no "holding company" to-da
that I know of.

Q. Whatever you choose to call it, were you not at that time th
secretary and treasurer of another company other than these partic
ulars companies that had a roadbed? A. I was secretary of th
Washington Traction & Electric Company and two or three other
and two electric light companies. It had no more authority ove
any one of these companies than you had as a stockholder; it owne
the majority of the stock, I believe, in all of these companies. I
had an office then at 14th and East Capitol streets.

By Mr. MACKAY: Was not that payroll prepared at that office
A. I cannot say that it was any more than it was prepared in al
of the other offices.

Q. Just be frank about that Mr. Lackey.

The COURT: The offices were identical; they are all the sam
offices for these eight or nine companies.

Mr. MACKAY: But each of these two companies had two offices a
he says.

The COURT: No, it had an office in that building. They were al
in one office. I understand the witness to say they had one offic
and not eight offices.

By the COURT:

30 Q. Is that correct? A. They are all in the same room.
will say further that as secretary, I keep a separate minut
book for each company, and in the bookkeeping department ther
is a separate set of books for each company, we may have taken
man that was working a day at one place, who is charged agains
that company because he is employed by that company and to
morrow when he went to work for the Great Falls Company h
would be employed by that company. The time he worked fo
each company is charged against that company.

Q. Did you tell him who he was employed by? A. He knew where he was employed. He knew he was employed to go to work for anyone of these companies.

Q. This is the Metropolitan Railroad Company, Georgetown division (referring to the pay-roll) See if you find Mr. Looney's name there (indicating). A. You will not find it there.

Q. So that he was not employed by the Metropolitan road, to do any work on this particular road? A. Not during that period.

Q. From July 15th to July 31st? A. That is right. That is my recollection without going through it.

By the COURT:

Q. Does his name appear on that pay-roll? A. It appears in the general list of names on maintenance of way.

The COURT: But it appears on that pay-roll?

A. Yes, sir. It appears on the pay-roll.

By Mr. MACKAY: What does this caption "Maintenance of way" mean?

A. It means that this whole list of men were working on
31 the maintenance of way.

Q. Then the amount that is paid is charged up to each road for which they work? A. Yes; by charging them with the time they worked for each road. Mr. Looney's name does not appear on that pay-roll as an employee of the Metropolitan Railroad Company.

Q. During that period, from July 16th to July 31st, James W. Dye was the conductor of the car? A. He was a conductor on the Metropolitan and Great Falls car.

By Mr. MACKAY:

Q. Mr. Dye was a conductor on the Metropolitan Road car? A. No, he was a conductor on the Metropolitan & Great Falls car.

Q. He was a conductor of the car upon which this accident happened? A. That was the car that was over the pit at that time. He was the conductor on the car that was over the pit; he was the conductor on the car from which Mr. Looney took the plow.

By the COURT:

Q. Does the pay-roll show that Looney was paid by any company? A. No.

Mr. COLE: That does not show by what company he was paid, I take it.

The WITNESS: The only showing on this pay-roll is the total amount due to the men. Then from the information in Mr. Shafer's book we make up the account which shows that he worked
32 at 7th and Pomeroy streets at the time.

Q. And the time he worked for the Anacostia & Potomac would be charged to that road? A. Yes, sir. Then it also says that he worked seven hours on the Great Falls road, and that

would be charged against the Great Falls road because he wa working for that company. The road-master was paid from th funds of the several roads. Separate bank accounts were kept fo each company.

By Mr. MACKAY:

Q. When Mr. Looney, for instance, was paid that $1.05 where di that money come from? A. From the treasurer of the Washingto & Great Falls Railway Company.

Q. Please mention what railroad company you mean when yo say "we"? A. I mean these eight railroad companies that ar listed here.

Q. What interest have the other seven railroads in the ownershi of a car which belongs to the Metropolitan Railroad Company? A They had no interest in the Metropolitan property. Each compan had to keep its property marked. There are cars marked "Anacosti and Potomac Railroad Company" running out over there and yo would not say that was the Anacostia railroad. Each car wa marked with the name of the company, that owned it and not th name of the company that was operating it.

Q. In whose employ was Mr. Dye? A. In the employ of the Grea Falls and the Metropolitan.

Q. He was employed by the two companies? A. Yes, sir.

Q. That is the way you figure it out?

33 Mr. COLE: I object to Mr. Mackey testifying.

By Mr. MACKAY:

Q. What is this arrangement made for? A. Which arrangemen do you refer to?

Q. The consolidation of these companies, and having Mr. Dye a one moment a conductor on one car and at the next moment a con ductor on another car on another road?

Mr. COLE: I must object to that question for the reason that M Mackay's question assumes that these roads are consolidated, whil all the evidence that has been given in relation to the matter has tendency to show that they were not consolidated at all, but the simply had an operating arrangement.

The COURT: They had some kind of an operating arrangement and I take it for granted that this question calls for that.

Mr. MACKAY:

Q. Was that arrangement in writing? A. No, sir.

Q. Who informed you of the arrangement? A. I was present I was a party to the conference, really, you may call it. We ha the act of Congress before us. I might say I have been connecte with the railroad since 1895.

By Mr. COLE:

Q. Let me ask in that connection whether or not you were a member of the board of directors of each of these companies? A. I am.

34 Q. As well as secretary of each one of them? A. Yes, sir.

By the COURT:

Q. Were not these trackage arrangements entered in the minutes of the different companies? A. No, Judge, there was nothing to enter. It was an informal arrangement. Here was the act of Congress. The early history of it is that the Brightwood and the Georgetown and Tenallytown and all these railroads had been trying for years to get their cars into the city proper. There was nothing but just to turn the cars loose on the tracks. The act of Congress defined what was to be done. When the railroads on both sides were in a position to do it, and got the facilities it was done. There was nothing to enter. Here is a railroad. The car comes to 36th street and the Metropolitan railroad under that act of Congress said "All right come on." That is all there was to it.

By Mr. COLE:

Q. These cars collected fares wherever they were, did they not, by the arrangements with each other? A. Yes, sir, the Metropolitan car that started in the city, say, taking the F Street line, which is the only line that went out across that line. It collected fares until it got to 36th St., at the curve; that is, the end of the Metropolitan line, where it curves to go back into Prospect street. Immediately it got into that curve to go into Prospect street it was a Great Falls car and went on the Great Falls track.

By Mr. MACKAY:

Q. Immediately it got into the curve it was what? A. A Great Falls car and went on the Great Falls track.

35 Q. That is your theory about it? A. No, that is not any theory at all.

By the COURT:

Q. Then they collected fares from that point, did they not? A. Not from anybody who was already on the car. The act says no fare shall be collected except from the people who get on the first car. Now, if anybody had gotten on that car, a new passenger, from the time it went around that curve, he would have been required to pay a fare to the Great Falls Railroad Company.

The COURT: The witness says, that those who got on the car in the city did not pay another fare there.

The WITNESS: Not until they got to the District line.

The COURT: I was trying to see where the line was, where they made the distinction about these fares, under this act.

The WITNESS: When they go into Maryland. There is another fare in Maryland, from the District line to Cabin John bridge.

Mr. MACKAY: I understand that, but here starts a Metropolitan Railroad car going up F street to 36th and Prospect avenue. It is still the same car, is it not?

A. Yes, sir.

Mr. MACKAY: There is no contract of sale by which that car has been sold to the Great Falls Company.

A. The Great F[illegible] pays car rental though.

36 By Mr. COLE.

Q. You were going on to state what the arrangement was, Mr. Lackey. You stopped before you got half way through with it.

By the COURT:

Q. Go on, and finish your answer, Mr. Lackey. A. I had gotten to the point, as I understand it, where the car had operated over the F Street line.

By Mr. MACKAY:

Q. Up to that point, it was an F Street or Metropolitan car? A. Yes, the Metropolitan Railroad charter gives it a right——

Q. I want to ask you about this as we go along, so we can have it clear in my mind and in the mind of the jury. Up to that time that car was owned by the Metropolitan Railroad Company, was it not? A. Up to what time?

Mr. COLE: It is owned all the time by the Metropolitan Railroad Company.

By Mr. MACKAY:

Q. When it was on the Metropolitan Railroad track, was it not a Metropolitan car? A. When it was on the Metropolitan Railroad tracks it was owned by the Metropolitan Railroad Company.

Q. If it had jumped the track and been in the street, it would have been owned by the Metropolitan Railroad Company, would it not? A. It would, when it went off the tracks of the Metropolitan Railroad Company onto the tracks of the Great Falls Railway Company, it was no longer a Metropolitan Railroad car, and that railroad company had no control over it.

37 Q. That is your conclusion, is it not? A. No, sir, that is what it is, and that is the law. That is what was done.

Q. We will inquire into that now. This, you say, was a Metropolitan Railroad car built for the Metropolitan Railroad Company? A. It was built for the Metropolitan Railroad Company.

Q. And was a Metropolitan Railroad car?

Mr. COLE: There is no doubt about that. There is no doubt but that the Metropolitan Railroad Company continued to own that car.

The COURT: And he says the other company hired the car as I understand him?

Mr. COLE: Certainly, while it was on their tracks.

By Mr. MACKAY: When that Metropolitan Railroad car went onto the Great Falls line, did the conductor change, was a new man put there?

A. No, sir, the same conductor and the same motorman, but they were not under the control of any Metropolitan Railroad employé.

Q. Yes, you want to save yourself. I understand that.

Mr. COLE: He is stating what the arrangement was between these companies. It is not his inference. It was only an arrangement, but it will be seen, when you look at this act of Congress, that it could not have been anything else under the act of Congress.

By Mr. MACKAY: Where do you get the authority for saying that the Great Falls Company was the lessee of that car after it got
38 off the Metropolitan track upon the Great Falls track?

A. That act of Congress says that the compensation &c. for the use of these cars and tracks—this reciprocal trackage arrangement—there should be an agreement as to the use of them. I don't remember the exact words.

Q. A reciprocal arrangement. That was all it said? A. That was the authority.

By Mr. COLE:

Q. What arrangement was made in consequence of it? A. That these cars should run over the Great Falls track; that the Great Falls road should take whatever receipts were taken in on that car and should pay car mileage, rental.

By Mr. MACKAY:

Q. In the general accounting between the companies? A. No, sir, a specific report.

Q. These several companies kept account of what should be the proportionate expense and charged it to this company, for running the car upon its tracks? A. No, sir, there was no arbitrary apportionment. There was an absolute definite account kept. And the conductor had to turn in to the Great Falls Railroad Company a specific amount that he collected on the Great Falls lines.

By the COURT:

Q. What did the Great Falls pay for the use of that car? A. I don't know the exact amount, Judge, but it was a fraction of a cent per car mile. In other words one car from the time it leaves 36th street until it got back, made 12 miles, and it paid a certain per cent. Of course, it did not pay for that particular trip,
39 because during the course of the day it would make 60 miles.

Q. You mean it paid so much mileage? A. Yes, so many fractions of a cent per mile. I don't know that fraction.

By Mr. MACKAY:

Q. When the conductor Dye, went to get employment as a conductor he was employed by the Metropolitan Railroad Company, was he not? A. No, sir.

Q. By whom was he employed? A. There is no specific arrangement for employment, Mr. Mackay, when the men are employed, they may be sent to any road. We don't employ men for the Metropolitan. He was not employed for the Metropolitan Railroad Company.

Q. That is not the thing. At the time of this accident or just before it, Mr. Dye was a conductor, you say, of the Metropolitan Railroad Company? A. He was a conductor operating a car over the line of the Metropolitan railroad.

Q. Was he carried on the books of the Metropolitan Railroad Company as a conductor on its road? A. No more than he was on the books of the Great Falls.

Q. I don't care whether "no more" or not. I want to know was he accounted on the books of that company as a conductor? A. He was accounted a conductor of that road. He was also accounted a conductor of the Great Falls.

Q. And the road kept an account with him as its conductor? A. No, we kept no account with him. He paid himself every day.

Q. It kept an account with himself then, and so much money was paid to Dye for conducting that car? A. No, Dye pays himself every day; he took $2.00 or whatever was coming to him out of his trips. We don't have a payroll for conductors and motormen. They are paid every day.

Q. Does he not return to that company his receipts? A. He returns to the two companies his receipts. He would return to the Great Falls what he got on that line and he would return to the Metropolitan what he got on that line.

Cross examination.

By Mr. COLE:

Q. I want to put a question or two. Do you remember about what time this trackage arrangement was made amongst these companies? A. In the neighborhood of the latter part of 1900—yes, about the middle of 1900 or the latter part.

Q. State whether that arrangement was in force at the time of this accident? A. It was in force.

Q. We will take the day of that accident and the car near which the accident occurred, the car that was going to Great Falls. Who paid Mr. Dye for the time he spent that day as conductor, and his services as conductor from the time he went into Prospect street on that trip, when the accident happened, until he got back to that point again? A. The Great Falls Railway Company.

Q. How was he paid? A. That one trip would take him an hour

on that line. He might during the course of that day have made six trips from East Capitol street out to Cabin John. He had knowledge himself how many trips, and how much time he had spent on the Great Falls line, and for that time he charged
41 the Great Falls Railroad Company and deducted it from the receipts on that line.

Q. And the money that he took on the Great Falls line—what did he do with it? A. He turned it in in his trips, the receipts of the Great Falls line.

Q. Was he required then to keep a separate account of the money he took in on the Metropolitan line and a separate account of the money he took in on the Great Falls line, and when he made his return to the office to show how much money he took in on each line? A. Yes, sir; he was.

Q. And how much he deducted from each company's money for his own services? A. Yes, sir.

Q. How was the motorman paid? A. In the same way.

Q. Who deducted the money for the motorman? A. The conductor.

Q. When men that were employed on other branches of the work, such as is shown by that payroll there, where they worked in the pits and in keeping the track in order, and all that, where they were transferred from one road to another, worked a portion of a day, or a whole day, or a number of days, for one company, and then following that worked for another company, how were they paid? A. They were paid by the company for whom they worked.

Q. Who kept an account of their time—the space of time they worked for each company, and reported that, so that they could be paid accordingly, and the amounts paid charged to the proper
42 company? A. The track and roadways accounts were kept by Mr. Shafer.

Q. Who employed the men that he had charge of? A. He put them on.

Q. And who discharged them? A. If he didn't want a man he would say so, and he would go.

Q. He had the power to employ and discharge the men? A. Yes.

Q. And to direct them where to work? A. Yes.

Q. Inasmuch as we have been talking of fares a little here—at the time this accident occurred, a person who took the Metropolitan car anywhere within the city limits to go to Cabin John bridge paid how many fares between here and Cabin John bridge? A. Two fares, a ticket and cash.

Q. The fare he paid in the city carried him how far? A. Carried him to the District line.

Q. That carried him over the first part of the Great Falls road? A. Yes, sir.

Q. Now suppose a person got on the car after it got onto the Great Falls road, say in Prospect avenue, or anywhere between that point,

Prospect avenue, and the District line, what fare did he have to pay? A. He had to pay a ticket fare. A ticket fare would be good.

Q. He had to pay a fare, whether it was by a ticket or anything else? A. He paid a fare.

Q. In order to get to the District line? A. Yes, sir.

43 Q. So that it cost a person who took a car in Prospect avenue, or anywhere west of Prospect avenue just as much to go to Cabin John as it did a person who would take it here in front of the city hall? A. Yes, sir, any place west of 36th street.

By the COURT:

Q. That fare would have belonged to the Great Falls Company, if taken between Prospect avenue, or 36th street, and the District line? A. Yes, sir.

By Mr. COLE:

Q. It would belong to the Great Falls Company? A. Yes, sir.

Q. Now, Mr. Lackey, this trackage arrangement and fare arrangement and all the arrangements that you have been testifying to that existed between these companies, at the time of this accident, were made by whom? A. My best knowledge is that the president and vice-president and myself were present. There may have been some others present. We talked it all over with that act in front of us. We thought it was a desirable thing to do, and we found authority for doing it in the act, and directed that it be done.

Q. It was done by the officers of the various companies? A. Yes.

By Mr. MACKAY:

Q. It was not entered upon the minutes or anything of that sort? A. No, sir, not to my knowledge.

By Mr. COLE:

Q. How long did that arrangement remain in force, as to the Metropolitan and Great Falls, I mean? A. Until they were all one concern.

44 Q. Until they were all made one company? A. Yes, sir.

Q. When did that occur? When were the Great Falls and the Metropolitan and the Columbia merged under that act of Congress into one company? A. In February 1902.

Q. And that arrangement you have testified to continued to exist down to the time of that merger? A. Yes.

The COURT: Those three companies?

Mr. COLE: Those three companies, yes.

The WITNESS: The Metropolitan and the Great Falls.

45 The plaintiff then called to the stand one, SHAFFER, who testified that he was the assistant roadmaster of the Washington Railway and Electric Company and was then asked by counsel for plaintiff whether or not he had produced, in response to the *subpœna duces tecum* served upon him (which subpœna is part of the record in this case) any record of the men in his employ, and he replied that he had, and when called upon to produce the same, produced a small blank book, marked on the back "Time book." Said book contained pencil entries of the time and number of days and hours which the men, whose names were given in said book were purported to be employed and covered the time from July 16th to July 31st, both inclusive.

Among the names so given was that of James Looney, the deceased, showing the employment of said Looney on the 28th day of July, 1901, at 36th — and Prospect avenue, for seven-tenths of a day, and that he was paid the sum of $1.05, said Looney being paid at the rate of $1.50 per day.

That witness sent deceased to work at the Prospect Avenue pit, that he was assistant roadmaster of the Washington and Great Falls Electric Railway Company at the time of said accident, and has been for about four years, and was also assistant roadmaster of all the other railway companies hereinbefore mentioned; that at the time of said accident and prior thereto it was his duty to employ all men for all of the companies hereinbefore mentioned, who worked upon the tracks or road-way or in the pits; that the men so employed were not employed to work for any particular company, but

46 for any or all of the said railway companies, hereinbefore mentioned as occasion might require, and that he had authority to direct any of the men to work at any place upon any of the roads or in any of the pits where he saw fit, and had authority to send Mr. Looney to work in the pit in Prospect avenue; that men so employed were not assigned to any one place at all; that he had the power to discharge the men; that the men employed by him were paid by Mr. Brown who was paymaster.

Said Shaffer further gave evidence tending to show that he knew said Looney well, that he was an experienced pitman, that he had been employed for some time prior to the day of the accident at the pit of the Brightwood Railway Company, at the intersection of 7th and Pomeroy streets, in the city of Washington, which was in construction substantially like the one in Prospect avenue.

That on the day previous to the accident, said Looney had asked him for extra work to do, in addition to the work he was doing at 7th and Pomeroy streets.

That witness then told Looney to go the next morning (Sunday) July 28th, 1901, to the pit located on the line of the Great Falls Railway Company at 36th and Prospect avenue as heretofore described. That said Looney accordingly went there the next morning and worked in the pit, performing the duties of a pitman until he was killed as heretofore related in the testimony.

On cross-examination said witness testified that all the pitmen on the various roads were under his charge and were required to go to any of the pits on the respective roads to which they might be ordered by witness.

The plaintiff offered evidence tending to show that the conductors of the Metropolitan Railroad Company cars were held responsible for the management and running of the car; that they directed the motorman when to start the same and when to stop; but that when the superintendent of the road was present the conductor
47 and those under him were subject to the control of said superintendent and were required to obey his orders.

The foregoing recitals of the evidence constitutes all the material evidence offered at the trial.

Thereupon, plaintiff announced her case in chief closed. Defendant's counsel thereupon moved the court to instruct the jury to render a verdict for the defendant, which the court, after argument, granted, and the jury rendered a verdict for the defendant, to the granting of which motion the plaintiff, by her counsel, then and there and before the rendering of said verdict, excepted, and prayed the court to note said exception upon its minutes, which was done.

And the plaintiff, by her counsel, prays the court to sign and seal this her bill of exceptions, which is accordingly done, now for them, this 15th day of March, A. D. 1904.

JOB BARNARD, *Justice.*

48 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 47, inclusive, to be a true and correct transcript of the record, as per rule 5 of the Court of Appeals of the District of Columbia, in cause No. 45,405, at law, wherein Marian J. Looney, administratrix of the estate of James F. Looney, deceased, is plaintiff, and The Metropolitan Railroad Company *et al.* are defendants, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 29th day of March, A. D. 1904.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1418. Marian J. Looney, adm'x, &c., appellant, *vs.* The Metropolitan Railroad Company *et al.* Court of Appeals, District of Columbia. Filed Mar. 29, 1904. Henry W. Hodges, clerk.

Addition to Record per Stipulation of Counsel.

Court of Appeals of the District of Columbia, April Term, 1904.

MARIAN J. LOONEY, Administratrix of the Estate of James F. Looney, Deceased, Appellant,
vs.
THE METROPOLITAN RAILROAD COMPANY and THE Washington Railway and Electric Company.
} No. 1418.

Filed May 3, 1904.

In the Court of Appeals of the District of Columbia, May 3, 1904.

MARION J. LOONEY, Adm.,
vs.
METROPOLITAN RAILROAD CO.
} No. 1418.

The defendant (appellee) hereby waiving any formal proceedings to bring up the annexed copies of the *subpœnas duces tecum* issued to the witnesses Lackey and Schafer in this cause, by certiorari or otherwise, agrees that the annexed copies may be filed and printed and be made together with the certification of the clerk of the supreme court of the District of Columbia a part of the record of this cause on appeal.

C. C. COLE, *Att'y for Appellee.*
FRANKLIN H. MACKEY,
Att'y for Appellant.

Spa. ad Test.

Issued October 30, 1903.

Supreme Court of the District of Columbia.

MARIAN J. LOONEY, Adm'x,
vs.
MET. R. R.
} No. 45405. At Law.

The President of the United States to James B. Lackey:

You are hereby commanded to appear as witness for the plaintiff before circuit court, division No. 1, on the 2d day of November, 1903, at 10 o'clock a. m. (and bring with you)—

First. The agreement between the Washington Traction and Electric Company and the Metropolitan Railroad Company as to the use of the railroad tracks of the latter company.

Second. The agreement between said first named company and

the Washington & Great Falls Electric Railway Company as to the use of the railroad tracks of said last named company.

Third. The agreement between the Washington Railway and Electric Company and the Metropolitan Railroad Company as to the use of the railroad tracks of the latter company.

Fourth. The agreement between the Washington Railway and Electric Company and the Washington & Great Falls Electric Railway Company as to the use of the railroad tracks of the latter company.

Fifth. The payroll of the Washington Traction and Electric Company; the Washington Railway and Electric Company; the Metropolitan Railroad Company, and the Washington & Great Falls Electric Railway Company for the last week of July 1901, especially that of the 28th of July, 1901.

Sixth. Memorandum or receipt of the past payment made to James F. Looney, or his widow, Marion J. Looney, for any wages due the said James F. Looney at the time of his death.

and not depart the court without leave.

Witness: The Honorable Harry M. Clabaugh, chief justice of said court, this 30th day of October, 1903.

[SEAL OF COURT.]

J. R. YOUNG, *Clerk*,
By FRED. C. O'CONNELL,
Ass't Clerk.

Endorsed.

Let this writ issue.

HARRY M. CLABAUGH,
Chief Justice.

Marshal's Return.

Summoned James B. Lackey personally, November 2, 1903.
AULICK PALMER, *Marshal.*
S.

Spa. ad Test.

Issued October 30, 1903.

Supreme Court of the District of Columbia.

MARIAN J. LOONEY, Adm'x,
vs.
MET. R. R.
} No. 45405. At Law.

The President of the United States to Wm. H. Schaefer, ass't road master &c., 508 9 N. W.:

You are hereby commanded to appear as witness for the plaintiff before circuit court, division No. 1, on the 2d day of November,

1903, at 10 o'clock a. m., (and bring with you) the pay roll or other records showing the list of railroad employees on July 28" 1901, under your management, and not depart the court without leave.

Witness the Honorable Harry M. Clabaugh, chief justice of said court, this 30" day of October, 1903.

[SEAL OF COURT.]

J. R. YOUNG, *Clerk*,
By FRED. C. O'CONNELL,
Ass't Clerk.

Endorsed.

Let this writ issue.

HARRY M. CLABAUGH,
Chief Justice.

Marshal's Return.

Summoned the within named witness personally, October 30, 1903.

AULICK PALMER, *Marshal.*
S.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify the foregoing to be true and correct copies of the two *subpœnas duces tecum*, issued October 30, 1903, omitted by inadvertence from the record heretofore transmitted to the Court of Appeals of the District of Columbia in cause No. 45,405, at law, wherein Marian J. Looney, administratrix of the estate of James F. Looney, deceased, is plaintiff, and The Metropolitan Railroad Company *et al.* are defendants, as the same remain and appear upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 14th day of April, A. D. 1904.

JOHN R. YOUNG, *Clerk.*

[Endorsed:] No. 1418. Marian J. Looney, administratrix, &c., appellant, *vs.* The Metropolitan Railroad Company *et al.* Addition to record per stipulation of counsel. Court of Appeals, District of Columbia. Filed May 3, 1904. Henry W. Hodges, clerk.

THURSDAY, *December 8th, A. D.* 1904.

MARIAN J. LOONEY, Administratrix of the Estate of James F. Looney, Deceased, Appellant,
vs.
THE METROPOLITAN RAILROAD COMPANY and THE Washington Railway and Electric Company. } No. 1418.

The argument in the above entitled cause was commenced by Mr. M. D. Rosenberg, attorney for the appellant, and was continued by Messrs. B. W. Parker and C. C. Cole, attorneys for the appellees.

FRIDAY, *December 9th, A. D.* 1904.

MARIAN J. LOONEY, Administratrix of the Estate of James F. Looney, Deceased, Appellant,
vs.
THE METROPOLITAN RAILROAD COMPANY and THE Washington Railway and Electric Company. } No. 1418.

The argument in the above entitled cause was concluded by Mr. Alexander Wolf, attorney for the appellant.

MARIAN J. LOONEY, Administratrix of the Estate of James F. Looney, Deceased, Appellant,
vs.
THE METROPOLITAN RAILROAD COMPANY and THE Washington Railway and Electric Company. } No. 1418.

Opinion.

Mr. Justice MORRIS delivered the opinion of the court:

This is a suit at common law instituted in the supreme court of the District of Columbia, under the statute to recover compensation for death resulting from alleged negligence of the defendants.

The appellee, The Metropolitan Railroad Company, is, or at the time of the accident here complained of, which was July 28, 1901, was a company owning and operating an electric railroad in the city of Washington, having its western terminus at the intersection of Prospect avenue and Thirty-sixth street northwest, where it connected with the line of a company then known as the Washington and Great Falls Electric Railway Company, and now known as the Washington Railway and Electric Company, which line ran westward from its connection with the Metropolitan railroad to or towards the Great Falls of the Potomac river in Maryland. The cars on the Metropolitan railroad were and are propelled by an underground system of electricity; those on the Washington and Great Falls railway were and yet are propelled by what is known as the trolley or overhead electric system. Cars were run from one

line to the other under an agreement believed to have been authorized or sanctioned by law; and when cars were so transferred, the change was effected by an arrangement of machinery in pits, designated as "plow pits," constructed under the railroad tracks, which, however, required the services of a pitman, as he was called, for its adjustment to the cars as they passed over it.

The plow pit for the transfer of cars from the underground system of the Metropolitan railroad to the overhead system of the Great Falls railway was constructed in Prospect avenue a little distance west of the junction of the two roads, and therefore wholly on the line of the Great Falls railway; and it extended underground under both tracks and the space between the tracks, so that the pitman descending into it from the street could pass from one side to the other and adjust the machinery under a car on either track to change from one system to the other.

On the afternoon of July 28, 1901, James F. Looney was the pitman at this point. A car belonging to the Metropolitan Railroad Company came down Thirty-sixth street on the Metropolitan railroad, rounded the curve at the junction of Thirty-sixth street and Prospect avenue, ran upon the tracks of the Great Falls railway and stood over the plow-pit that has been mentioned, stopping there for the purpose of having the machinery adjusted to transfer it to the overhead system and to enable it to run west to Cabin John bridge on the Great Falls road. As the car was rounding the curve at the junction, Looney descended into the plow-pit through the trapdoor in the south or east-bound track. Soon after the car stopped over the pit a groan was heard in the pit; the car was moved westward from over it on a descending grade over which it was passed for some little distance by the mere force of gravity, and the dead body of Looney was taken from the pit. He had been instantly killed by contact with the electric wires.

Thus far there is no dispute between the parties. The controversy arises over the manner in which the deceased received the electric shock which killed him, and whether either of the defendant companies or both of them are responsible for having caused his death through the negligence of their employees. The question is whether there was such negligence, or whether the death was the result of mere accident or mistake on the part of Looney himself, and, if there was negligence, whether the doctrine of the law in regard to fellow servants does not apply, inasmuch as it is claimed on behalf of the appellees that both the pitman and the conductor of the car, who is chargeable with the negligence, if any there was, were both at the time of the accident employees of the Great Falls Company. In this connection the contention on behalf of the appellant is that the deceased at the time was an employee of the Great Falls Company, and the conductor and motorman of the car were employees of the Metropolitan Railroad Company, and that therefore the doctrine in regard to fellow servants does not apply.

At the trial the only testimony taken was on behalf of the plain-

tiff, and there are no bills of exception based upon the exclusion or admission of any testimony. At its conclusion the defendants moved the court to direct a verdict in their favor, which was accordingly done. It does not appear in the record upon what ground the motion was based, or upon what ground it was allowed; but counsel for the appellees state in their brief, and it seems to be admitted in the brief for the appellant, that two grounds were assigned for the motion, namely: 1st that the deceased and the conductor charged with the negligence were fellow servants of the same company, and therefore that the plaintiff could not recover; and 2d that the testimony failed to establish any negligence on the part of the conductor; and that the court below made no ruling on the second ground, but sustained the motion on the first ground.

Verdict and judgment were rendered for the defendants, from which the plaintiff has appealed.

There was much discussion in this case, both in briefs and oral arguments, over the effect and bearing of certain acts of Congress upon the powers of the two railroad companies here sued; and there was an effort by the appellant to show that the car of the Metropolitan Railroad Company, in connection with which Looney lost his life, was unlawfully on the track of the Washington and Great Falls Railway Company. But this discussion seems to us wholly irrelevant. The act of Congress of June 5, 1900 (31 Stat. 270), authorized these two railroad companies and six other urban and suburban railroad companies in the District of Columbia and three other suburban companies whose roads extended into the State of Maryland, to contract with each other for the use of their respective roads or routes, or any part thereof. The act was accepted, and the two companies here concerned did so contract. At all events, we find them using the roads of each other; and we must presume that they did so under the act of Congress and in accordance therewith. Using the tracks of each other, they must be held to have adopted the appliances of each other for the running of their cars so far as was necessary for such use. For that use the employees of the one became the employees of the other; and all the employees became the fellow employees of each other.

It would seem to be absurd to make the rights and duties and liabilities of these employees as to each other dependent upon the special terms of the agreements of these companies between themselves, which were never communicated to them and which they had no opportunity to ascertain. Without attempting to go at any length into the relation of these several companies with each other, it seems to be sufficient to note that, prior to the passage of the act of June 5, 1900, there existed here a company or combination known as the Washington Traction and Electric Company, the purpose of which evidently was to gain control of various street railroad organizations in the District of Columbia, and to combine them in one system. This was sought to be accomplished and was in fact accomplished by the purchase of the stock of the several companies, or of

a controlling interest therein. Thus the Washington Traction and Electric Company became possessed of a controlling interest in the stock of the Metropolitan Railroad Company and in the stock of the Washington and Great Falls Electric Railway Company, among others, and apparently remained so possessed and in control of these two companies at the time of the accident which gave rise to the present suit. More for the purpose of bookkeeping, it would seem, than for any other purpose, the organizations were kept separate in name, but with the same officers in each and all the companies, as well as in the controlling company. They had all but one office; and except for the purpose of accounting, the organization was the same for all. The employees would be shifted around, as occasion required, from one road to the other, by one and the same superintendent. The deceased Looney himself had been so shifted, and had only been about two weeks in the position which he occupied at the time of his death. Under the circumstances, therefore, whether the Washington Traction and Electric Company, the controlling company, be regarded as the real employer of all the employees serving on these several roads, or whether the combination of roads must be regarded as a kind of partnership employing the same employees, it is very clear that the deceased Looney was an employee on each and all of the roads, as occasion required; that he took the ordinary risks of such employment; and that it would be absurd to hold him as a co-employee of the conductor, when a car of the Great Falls railway was over the pit, and as a stranger to the conductor when a car of the Metropolitan railroad was over it, when he was hired to do the same service for every car.

By the act of June 5, 1900, the Washington and Great Falls Railway Company was authorized to purchase the stock, property, and franchises of any other of the railroads mentioned, and to change its name, if it was thought proper to do so; and in pursuance of this authority it purchased the stock, property, and franchises of the Metropolitan Railroad Company, and took the name of the Washington Railway and Electric Company, by which it has here been sued. The purchase and the change of name seem to have been effected after the accident which is the basis of the present suit; and they are not deemed to have affected the present suit in any way, further than in the form of the suit.

We are of opinion that there was no error in the ruling of the court below that the deceased Looney and the conductor of the car, in connection with which the accident happened, were fellow servants; and that therefore, under the well established rule of law, harsh though it may appear on occasions, the deceased took upon himself the risk of the negligence of his co-employee and can not hold the common employer of both liable for it.

2. Error is assigned on behalf of the appellant on rulings of the trial court in reference to the contract stated to have been entered into by the two roads in pursuance of the several acts of Congress, authorizing them to enter into arrangements with each other. It

is claimed that the trial court should have submitted to the jury the question whether there was such a contract, and what were its terms; and that it was error on the part of the court to hold that the contract was valid, and was binding upon the employees of the parties to it. As a matter of fact no such rulings appear from the record to have been made, except in as far as they may be inferred from the action of the court in taking the case from the jury at the conclusion of the plaintiff's testimony. But there was no error in any event. The only testimony in regard to this contract was that of the plaintiff's own witness, who indeed, was secretary of the defendant companies and a director therein, and therefore to be regarded as a hostile witness, but whose testimony, nevertheless, was clear, unequivocal, and to the point. He stated that the contract was only oral, and he gave its terms. There was nothing to submit to a jury; and there was nothing to indicate invalidity in the contract. It was certainly not invalid, because it was not committed to writing. It is difficult to see wherein there was any error here.

3. It might well be that the judgment of the trial court could be sustained on the ground that there is no sufficient testimony to show negligence on the part of the conductor or motorman of the car. The tendency of the testimony on behalf of the plaintiff is rather to show accident than negligence. The testimony of the coroner is very distinctly to that effect. He testifies that the death was caused by the contact of the electric current with the back of the deceased just beneath the shoulders, and there was no evidence of contact anywhere else. If the death had resulted from contact of the electric current with the hands of the deceased there might have been some reason to infer negligence on the part of the conductor or motorman; but as the cause was decided by the trial court on the other ground, and that ground appears to be tenable, we deem it unnecessary to examine the testimony to determine whether there was sufficient to go to the jury on the subject of the negligence of the conductor or motorman of the car. The mode of the accident must remain unknown.

From what we have said it follows that the judgment appealed from must be affirmed, with costs.

And it is so ordered. Affirmed.

WEDNESDAY, *January 4th, A. D.* 1905.

MARIAN J. LOONEY, Administratrix of the Estate of James F. Looney, Deceased, Appellant,
vs.
THE METROPOLITAN RAILROAD Company and The Washington Railway and Electric Company.
} No. 1418. January Term, 1905.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the supreme court of the District of Columbia, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said supreme court, in this cause, be, and the same is hereby, affirmed with costs.

Per MR. JUSTICE MORRIS.

January 4, 1905.

TUESDAY, *January 10th, A. D.* 1905.

MARIAN J. LOONEY, Administratrix of the Estate of James F. Looney, Deceased, Appellant,
vs.
THE METROPOLITAN RAILROAD COMPANY and THE Washington Railway and Electric Company.
} No. 1418.

On motion of Mr. M. D. Rosenberg, of counsel for the appellant, it is ordered by the court that a writ of error to remove this cause to the Supreme Court of the United States issue, and the bond for costs is fixed at the sum of three hundred dollars.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between Marian J. Looney, administratrix of the estate of James F. Looney, deceased, appellant, and The Metropolitan Railroad Company and The Washington Railway and Electric Company, appellees, a manifest error hath happened, to the great damage of the said appellant as by her complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal,

distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 10th day of January, in the year of our Lord one thousand nine hundred and five.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by—
——.

(*Bond on Writ of Error.*)

Know all men by these presents, that we, Marian J. Looney, administratrix of the estate of James F. Looney, deceased, as principal, and Carl Auerbach are held and firmly bound unto the Metropolitan Railroad Company and the Washington Railway and Electric Company in the full and just sum of three hundred dollars to be paid to the said Metropolitan Railroad Company and Washington Railway and Electric Company their and each of their successors, certain attorney, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 19th day of January 1905, in the year of our Lord one thousand nine hundred and five.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said court, between Marian J. Looney, administratrix, plaintiff, and The Metropolitan Railroad Company and The Washington Railway and Electric Company, defendants, a judgment was rendered against the said Marian J. Looney, administratrix and the said Marian J. Looney, administratrix, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Metropolitan Railroad Company and the said Washington Railway and Electric Company citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, that if the said Marian J. Looney, administratrix shall prosecute said writ of error to effect, and answer all damages and costs if she fail to make

her plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in the presence of—

SAMUEL TALBERT. MARIAN J. LOONEY, [SEAL.]
Administratrix.
JOHN B. HEDIAN. CARL AUERBACH. [SEAL.]

O. K.
C. C. COLE.

Approved by—
SETH SHEPARD,
Chief Justice Court of Appeals of the District of Columbia.

[Endorsed:] No. 1418. Marian J. Looney, adm'x, &c. appellant, *vs.* The Metropolitan Railroad Company, *et al.* Bond on writ of error to the Supreme Court U. S. Court of Appeals, District of Columbia Filed Jan. 20, 1905 Henry W. Hodges, clerk

UNITED STATES OF AMERICA, *ss:*

To the Metropolitan Railroad Company and the Washington Railway and Electric Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein Marian J. Looney, administratrix of the estate of James F. Looney, deceased, is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard, Chief Justice of the Court of Appeals of the District of Columbia, this 20th day of January, in the year of our Lord one thousand nine hundred and five.

SETH SHEPARD,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted Jan. 21st, 1905.

C. C. COLE,
Att'y for Def. in Error.

[Endorsed:] Court of Appeals, District of Columbia. Filed Jan. 21 1905 Henry W. Hodges, clerk.

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 40, inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Marian J. Looney, administratrix of the estate of James F. Looney, deceased, appellant, *vs.* The Metropolitan Railroad Company and The Washington Railway and Electric Company, No. 1418, January term, 1905, as the same remain upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 24th day of January, A. D. 1905.

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 19,622. District of Columbia Court of Appeals. Term No. 173. Marian J. Looney, administratrix of the estate of James F. Looney, deceased, plaintiff in error, *vs.* The Metropolitan Railroad Company and The Washington Railway and Electric Company. Filed January 31st, 1905. File No. 19,622.

FILE COPY.

Office Supreme Court U. S.
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JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 173.

MARIAN J. LOONEY, ADMINISTRATRIX OF JAMES LOONEY, DECEASED, PLAINTIFF IN ERROR,

vs.

THE METROPOLITAN RAILROAD COMPANY AND THE WASHINGTON RAILWAY AND ELECTRIC COMPANY.

In Error to the Court of Appeals of the District of Columbia.

BRIEF FOR PLAINTIFF IN ERROR.

MAURICE D. ROSENBERG,
ALEXANDER WOLF,
SIMON LYON,
Attorneys for Plaintiff in Error.

LAW REPORTER PRINTING CO., WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 173.

MARIAN J. LOONEY, ADMINISTRATRIX OF JAMES LOONEY, DECEASED, PLAINTIFF IN ERROR,

vs.

THE METROPOLITAN RAILROAD COMPANY AND THE WASHINGTON RAILWAY AND ELECTRIC COMPANY, DEFENDANTS IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

This case comes into this court on a writ of error to the Court of Appeals of the District of Columbia, which court affirmed the judgment of the Supreme Court of the District of Columbia upon a bill of exceptions taken to the ruling of the latter court in instructing the jury to return a verdict for the defendant after the plaintiff had rested her case in chief.

The only question of law before the court is, whether, taking all the evidence for the plaintiff as a whole, it is sufficient to make such a prima facie case as entitled her to have the facts submitted to a jury.

The plaintiff is the administratrix of her deceased husband, James F. Looney, who, at the time of the accident hereinafter described, was employed as a "pitman" by the Washington and Great Falls Electric Railway Company of

this city, which company, since the accident, has changed its name to that of the Washington Railway and Electric Company, one of the defendants herein; this change of name, however, whatever its effect, is of no moment since the real defendant against whom the plaintiff claims the verdict should have been rendered is the Metropolitan Railroad Company. Being so employed, he was on the day of the accident, July 28, 1901, at work in one of the plow pits located on the line of said Great Falls Company near its terminus at Thirty-sixth street and Prospect avenue northwest, into which he had been sent by the assistant roadmaster of said last-named company.

Connecting with the line of the Great Falls Company was the line of the defendant, the Metropolitan Company, one of whose termini was also at the crossing of Thirty-sixth street and Prospect avenue, connecting there with the line of the Great Falls Company. The last-named line is what is known as an "overhead trolley line" while the Metropolitan line is worked by an "underground system." Some of the cars of the Metropolitan Company, as was the case in this instance, are so equipped as to run either by the overhead trolley system or by the underground system. By the underground system they are propelled by an electric current connecting with the car through what is known as a "plow," which runs between the slot rail and connects with the underground current. By the overhead system the electric current is sent over the trolley wire into the motive machinery of the car through a "trolley pole" attached to the top of the car and made to touch the trolley wire when used in propelling the car.

To enable the car to pass from the line of the Metropolitan Company (the underground system) to the line of the Great Falls Company (the overhead system) it is necessary to run the car over an excavation on the line of the Great Falls Company at its terminus known as a "pit"

so that a man stationed therein, known as a "pitman" can remove the "plow" from the car and thus enable it to be run along the Great Falls track. During the operation of removing the "plow" it becomes the duty of the conductor of the Metropolitan car to exercise great care that the trolley pole is kept from touching the trolley wire, and for this purpose the trolley pole is provided with a rope which the conductor holds and keeps the pole held down so that it can not touch the wire. If while the pitman below is in the act of removing the plow the conductor on the car above the pit should permit the trolley pole to touch the trolley wire the consequence would be that a fatal current of electricity would be transmitted instantly into the motive machinery and thence through the plow into the pitman handling it, thus shocking him to death.

The evidence clearly shows that on the day of the accident one of the cars of the Metropolitan Company had been placed above the pit to enable the pitman (Looney) to remove the plow so that the car might continue its journey upon the Great Falls road to a resort in Maryland known as Cabin John Bridge by means of the overhead system. The conductor of this car, whose duty, as we have seen, was to keep the trolley pole of his car from touching the trolley wire, negligently failed to do so and in consequence of such negligence Looney was instantly killed by the electric current.

The defense of the Metropolitan Company is that, notwithstanding this negligence of the conductor, the plaintiff can not recover because the deceased was his fellow workman at the time of the accident. On the other hand, the plaintiff contends that they were not fellow workmen, but servants of independent and separate masters, the conductor being an employee of the Metropolitan Company and the deceased an employee of the Great Falls Company.

On the trial a great deal of testimony was given by the witness, Lackey, for the purpose of showing a trackage contract relation of the two companies to each other, which contract, whatever its terms were, was testified not to have been in writing. The court held that the evidence thus given showed such a verbal contract relation between them as to render the deceased a fellow workman with the conductor of the car, and that consequently the plaintiff could not recover. It is this ruling of the court upon the question of what the evidence tended to prove in this regard and the failure to submit the whole case to the jury which was the subject of exception to the Court of Appeals of the District of Columbia and which was affirmed by said court.

As an initial step to our brief upon that question we make the following:

ASSIGNMENTS OF ERROR.

1. The court erred in holding that the evidence established the deceased to have been a fellow servant of the conductor of the Metropolitan Company.

2. The court erred in not submitting to the jury the question as to what were the terms of the unwritten contract, and whether in fact there was such a contract.

3. The court erred in holding that the contract (if any existed and whatever its terms) was a valid contract.

4. The court erred in holding that the contract (if it existed and whatever its terms) was binding upon the employees of the parties to it.

5. The court erred in instructing the jury to return a verdict for the defendants.

ARGUMENT.

The principal witness as to the contractural relations, if any there were, between the two defendant companies was the witness Lackey, the secretary and treasurer of the Metropolitan Company and also of the Great Falls Company and of six other urban and suburban electric railway companies of the District of Columbia and Maryland. He was also secretary and treasurer of the Washington Railway and Electric Company.

It is important to state at this point that this witness was eminently an "adverse" witness towards the plaintiff. He was called to the stand to answer a subpœna duces tecum requiring him to produce the contract between the defendant companies (Rec. pp. 29–30) which may have existed at the time of the accident, and which the plaintiff believed, if it did exist, might disclose just what the trackage arrangement was whereby the Metropolitan Company was permitted to use the line of the Great Falls Company.

The witness on taking the stand at the call of the plaintiff was asked if he had brought with him such contract, replied that he had not, and then proceeded with the permission of the court and against the protests of the plaintiff to testify that the trackage arrangement of the companies was altogether verbal and went on further to state the character of that arrangement. Upon that subject he was clearly an adverse witness testifying under a cross-examination by the plaintiff's counsel. His testimony, so far as it is material to the questions at bar, was substantially as follows:

That the eight companies of which he was secretary and treasurer each had the same individuals as its officers and board of directors from president down to and including the roadmasters.

That these eight sets of officers were in fact one set of

individuals, who do their work in one office (Rec. p. 17). That the companies were separate and distinct, though the individuals acting as officers were identical, but that each officer kept a separate set of books for each company (Rec. p. 18). That a man working for any one of the companies might be sent to work for any other of the companies, and that the time he worked for such company would be charged against such company. That when a man was employed "he knew he was employed to go to work for any one of these companies." He did not, however, state by what authority under the charters of the various companies a man employed by one company could be made *an employee of another company.* One of the companies, viz., the Washington Traction and Electric Company, was a mere "holding" company, that is to say, it owned a majority of the stock of each of the other companies and the same individuals held the office of president and board of directors as held them in the other companies. "Each company kept its own property marked" (Rec. p. 20). The car on which the accident happened "was owned by the Metropolitan Company" (Rec. p. 22). None of the other companies "had any interest in the Metropolitan property." The trackage arrangement between the companies was "an informal arrangement" made at a conference" of the president, vice-president, and secretary of the companies, three individuals who held the twenty-four offices.

"*Looney (the deceased) was not employed by the Metropolitan road*" (*Rec. p. 19*). *Elsewhere* (*Rec. p. 27*) *it is proved by the roadmaster, Shaffer, that Looney was in the employ of the Great Falls Company on the day of the accident.* Mr. Dye "was a conductor operating a car over the line of the Metropolitan Railroad." He operated the car at the time of the accident (Rec. p. 24). On page 28 of the record the bill of exceptions states that, "The plaintiff offered evidence tending to show that

the conductors of the Metropolitan Railroad Company cars were held responsible for the management and running of the car."

The foregoing testimony, taken with the uncontradicted testimony of the other witnesses, is sufficient to show that at the time of the accident, the car, above the pit, was a Metropolitan car and that its conductor was the same conductor who had operated the car while on the Metropolitan line; that Looney who was in the pit, was an employee of the Great Falls Company; that Dye, the conductor on the car, held the rope attached to the trolley pole and negligently permitted it to touch the trolley wire whereby Looney was killed.

Upon this testimony alone the jury could well have found, and must have found, the Metropolitan Company liable. But, of course, the foregoing was not all the testimony of the witness Lackey. The record shows him testifying first one way and then another—and repeatedly contradicting himself and making impossible statements contradicted by every fact in the case and which could not possibly be true; for instance, to avoid the consequence of the fact that the car was owned, as he had admitted, by the Metropolitan Company, and that Dye was its conductor at and before the time of the accident, and further that the Great Falls Company had no interest in the property of the Metropolitan Company, he insists, notwithstanding, upon calling the car "a Metropolitan and Great Falls car" (Rec. p. 19), and Dye "a Metropolitan and Great Falls conductor." Whereas there is not the slightest testimony of the existence of such a company and, indeed, the record shows that there existed no such company.

On this theory of the witness that the car was "a Metropolitan and Great Falls car" and that Dye was "a Metropolitan and Great Falls conductor," it was held by the court that Dye must therefore have been an employee

of the Great Falls Company and therefore a fellow workman with Looney, the pitman, who was concededly an employee of the Great Falls Company, and not an employee of the Metropolitan Company.

As to the alleged trackage arrangement it does not appear that any such an arrangement existed which was binding upon any of the companies or upon the public, and especially not upon the workmen for the several companies so as to make them fellow servants of each other. Mr. Lackey says that the trackage arrangement "was an informal arrangement" (Rec. p. 21). "He was a party to the *conference* really you may call it" (Rec. p. 20). That his best knowledge is that the president and vice-president and myself were present; there may have been some others present. At that "conference" three men, one of them holding the eight presidential offices, the other the eight vice-presidential and the other the eight secretarial offices, in all, three men holding the twenty-four offices and claiming to represent the eight companies, made and put into operation this agreement, arrangement, understanding, or whatever it may be called, as to the use of the tracks of the several companies by the connecting companies.

Nowhere in the evidence does the witness give any clear, succinct, and concise statement of what the trackage arrangement was. It is plain that an arrangement, whatever it might be, could not be made in this manner to bind any of the companies as separate organizations. No charter authority for a *verbal* contract between the companies as to trackage arrangements is shown. Undoubtedly, the whole matter was in the breast of three men and not a contract of two railroad companies with each other. But what was this arrangement? Sifting Mr. Lackey's testi-

mony of its absurdities and contradictions, it seem to have been this:

That the Metropolitan car might run on the Great Falls road without change of conductors or motormen and that all fares collected while the car was on the Great Falls road should be accounted for to that road, but that all passengers who were on the car at the time it got on that road should be carried to the District line without further charge. That is to say, that when a passenger got on the Metropolitan car, at its eastern terminus near Lincoln Park northeast, the Metropolitan Company contracted to carry him for a fare of 5 cents to the District line, and so every passenger who got upon the car afterwards, while still on the Metropolitan road, could only be charged one fare to the District line; but if any person got on the car after it got on the Great Falls line, then the Great Falls Company was to receive that fare as compensation for permitting the other passengers to be carried over its road without further charge.

The parties by merely calling this agreement a *rental* of its car by the Metropolitan Company to the Great Falls Company could not make it so, if the agreement showed it to be otherwise. The Metropolitan Company had contracted with the urban passengers on its car to carry them through to the District line for one fare, and it was necessary that it should control the car to do this. The Great Falls Company collected no fare from these passengers when the car was on its road. The fare was collected by the Metropolitan Company through its conductor. The compensation the Great Falls Company received for permitting the Metropolitan Company to carry these passengers over its road to the District line was that in consideration of the granting of that privilege the Metropolitan Company would account to the Great Falls Company for

all fares received from passengers that got on the car while it was on the line of the latter company.

In pursuance of this arrangement conductors were instructed to keep an account of these fares, and when they were turned in by them to the general office they were entered on the books of the Great Falls Company.

To permit the Metropolitan Company to escape liability for the negligence of its conductor under the pretense that as soon as he got upon the Great Falls line with his car he was no longer an employee of the Metropolitan Company and the car no longer a Metropolitan car, but on the contrary, he, ipso facto, became a Great Falls employee and the car a Great Falls car, is to do that which the law not only does not sanction, but to pervert the actual arrangement into a *fictional* one for the purpose of escaping liability for the negligence of its conductor.

Moreover, even if such a fiction could be maintained as against the public and the employees of the various roads, nevertheless in this particular case the testimony shows that the car had not yet, under this fiction, become a Great Falls car nor the conductor a Great Falls conductor. It could only be called such (if at all) after it was fitted to run upon the Great Falls road as an *overhead* trolley car by the adjustment of the underground machinery so as to fit it for that purpose. *This adjustment had not been completed,* and until it was completed the car can not, even under defendant's contention, be said to have been a Great Falls car. Looney was in the act of adjusting the machinery to make it a so-called Great Falls car when he was killed by the negligence of the conductor. This conductor, moreover,was the man who, in behalf of the Metropolitan Company, had contracted with the passengers to safely carry them in the Metropolitan car to the District line for a fare of 5 cents from the various points in the city where they boarded the car. The Metropolitan Company

could not discharge itself of that contract by contending that the car was no longer a Metropolitan car and the conductor no longer in its employ. If the car had broken down while on the Great Falls road through a defective axle or wheel the conductor (as well as the passengers) would have been entitled to demand damages of the Metropolitan Company for any injuries they may have received, and it could not have escaped liability to the conductor by saying he was not in its employ and that the car was no longer under its control.

The Court of Appeals in their opinion say:

"It would seem absurd to make the rights and duties and liabilities of these employees as to each other dependent upon the special terms of the agreement of these companies between themselves, which were never communicated to them and which they had no opportunity to ascertain." And yet they held that the employee of one of the roads became the employee of the other, and all the employees became the fellow employees of each other, and this by reason of the agreement entered into between the roads under the act of Congress.

The Court of Appeals attempted to reconcile this inconsistency on the theory that the company known as the Washington Traction Company, the purpose of which they say was evidently to gain control of various street railway organizations of the District of Columbia, and to combine them into one system, among others, had the controlling interest of the Metropolitan Railroad Company and in the Great Falls Company, and apparently was possessed and in control of these two companies at the time of the accident and shifted the employees of the several companies around from one company to the other as suited their pleasure. It should be noticed that others besides the Washington Traction Company owned and possessed stock in these several

companies, and surely it can not be contended that because a company held stock in several corporations it possessed the power to shift the employees of the several companies, and in consequence thereof to make them fellow servants. The doctrine of fellow servants has never been carried to the extent that servants of two independent roads, operating distinct in every respect, having separate offices and separate stockholders, bonded by the issuance of separate bonds, and in every way live, subsisting corporations operating independently of each other, can be considered fellow servants. The joint use of tracks by two or more railroad companies will not make their respective employees coservants, nor can a corporation known as the holding company, organized for the purpose of holding a majority of the stock of the several companies, make the employees of these several companies fellow servants with each other.

The said appellate court further holds (Rec. p. 36) that because the coroner testified that the death was caused by the contact of the electric current with the back of the deceased just beneath the shoulders, and that there was no evidence of contact anywhere else, and that if death had resulted from contact of the current with the hands of the deceased that there might have been some reason to infer negligence on the part of the conductor or motorman, and that therefore there was not sufficient testimony to show negligence on the part of the conductor or motorman of the car.

The Court of Appeals evidently overlooked the testimony of the witness Frederick A. Anderson. He testified (Rec. p. 13):

> "That if while the man's hands were on the wire the connection was broken at any point, that is, if the trolley was pulled down and his hands afterwards released, *he would not receive a burn*, but would receive a shock, and that the burn is received when the contact is broken, and if the man

had hold of the wire with his hand and his hand is pulled away, that is when the burn occurs."

That therefore the question of negligence on the part of the conductor of the defendant, The Metropolitan Railroad Company, was one which should have been submitted to the jury.

From this general survey of the case we proceed now to a particular view of it from the point of view of certain propositions of law.

I.

The Alleged Trackage Agreement Was Not Made In Conformity With the Statute and Was Therefore Invalid.

The first section of the act of Congress of June 5, 1900 (31 St. L. 270), declares that eight city and suburban railway companies of the District of Columbia (naming them), including the Metropolitan Railroad Company and the Great Falls Company and three railway companies of the State of Maryland—

> "may . . . if not inconsistent with the laws of Maryland, from time to time, *by their respective boards of directors* enter into contracts with each other . . . for the use of their respective roads or routes, or any part thereof. No such contract *shall take effect* until the same shall have been approved by the *written* consent of the owners of at least three-fourths of the capital stock of each corporation, or by the vote of the owners of three-fourths of such capital stock *represented at a special meeting called and held as prescribed by law.*"

There is not the slightest evidence in this case that the trackage arrangement was entered into "by their respective boards of directors," nor that it was approved by the "written consent of the owners of record of at least three-fourths of the capital stock of each corpora-

tion," etc. The arrangement, if any, and whatever its terms were, was therefore without authority of law and not binding upon anyone, *a fortiori* not against the employees of the respective companies so as to make them fellow servants.

When the act of incorporation prescribes a mode of contracting, the corporation must observe that mode, or the instrument no more creates a contract than if the body had not been incorporated.

Head *vs.* Ins. Co., 2 Cranch, 127. See Roses' notes to this case.

Harborough *vs.* Shordlow, 7 Mees. & W. 87.

White *vs.* Orleans, 15 La. An. 667.

Baltimore *vs.* Reynolds, 20 Md. 1.

Zottman *vs.* San Francisco, 20 Calif. 96.

Bladen *vs.* Philadelphia, 60 Pa. St. 464.

The contract between the companies, even if made by the board of directors with the written consent of three-fourths of the stockholders, could go no further than to provide "for the use of their respective roads or routes or any part thereof." The statute does not authorize the leasing of the cars of one company to another and the transfer of the crew of those cars to the leasing company.

Even if there were no statute on the subject the arrangement as to leasing the cars would be void.

"A lease by a corporation of its property requires the consent of a majority of the stockholders, which must be expressed at a stockholders' meeting."

Bouv Law. Dic. Vol. I, 158 citing Fed. Rep. 513.

37 Id. 307.

138 Mass. 122.

14 Abb. N. C. 103.

15 Am. and Eng. R. R. Cases, 1.

Thomp. on Corp., Vol. V., secs. 5880, 5883, 5884, 5885.

II.

Even if the Alleged Trackage Arrangement Were Entirely Valid It Could Not Have the Effect to Make the Employees of the Respective Companies Fellow Servants.

In the case of Railroad Co. *vs.* State, Use of Bitzer, 58 Maryland, 372, the facts were as follows:

The Philadelphia, Wilmington and Baltimore Railroad Company, the Baltimore and Ohio Railroad Company, and other companies had entered into the joint enterprise of conveying passengers and their baggage between New York and Washington under a written agreement, and as part of said agreement it appeared that the cars of the B. & O. Co. were drawn by horsepower through Baltimore City from Camden Station to the depot of the defendant, the P. W. & B. Co., and thence on and along the track of the defendant to a point at which said cars were attached to a train to be made up for transportation to Philadelphia and New York. The plaintiff's intestate, Samuel Bitzer, was an employee of the B. & O. Co., and his duty was to drive the cars from said Camden Station along the tracks mentioned. While doing so, he was fatally injured by a defect in the defendant's track by reason of the neglect of the defendant's employees to keep said track in repair. Under these facts it was contended by the defendant that the negligent employees of the defendant were fellow servants of Bitzer and that he could not recover.

One of the prayers of the defendant was as follows:

> "If the jury believe from the evidence that the defendant, together with the Baltimore and Ohio Railroad Company and other railroad companies, was engaged in the joint enterprise of conveying passengers and their baggage and the mails between Washington and New York, and for that purpose had formed themselves into a combination, calling said combination the 'New York and

> Washington Through Line,' said combination having its own officers and treasury, and its accounts were kept in its own name, and that the deceased, Samuel Bitzer, met his death while acting as a servant of said Baltimore and Ohio Railroad Company, in furtherance of the object of said combination, then the plaintiff is not entitled to recover, even though the jury may find from the evidence that there was negligence on the part of defendant's servants, whereby the track of defendant, where the deceased met his death, was defectively constructed, or out of repair."

Another prayer was as follows:

If the jury shall find from the evidence that it was part of the duty for which deceased, Samuel Bitzer, was employed, by whomsoever he was so employed, to drive cars of the "New York and Washington Through Line," run under the agreement offered in evidence (if the jury shall find that said agreement was duly executed) through Baltimore City from Camden Station and going over that part of defendant's track where the accident occurred, deliver the same on defendant's track, . . . and that he was engaged in the performance of that duty at the time he met the injury that caused his death, then the plaintiff is not entitled to recover even if the jury shall believe from the evidence that said injury was caused by negligence of the defendant's servants, either in the construction or the condition of that part of the defendant's track where the accident occurred.

The court, Grason, J., delivering the opinion, ruling upon the correctness of these prayers, said:

> "They are all based on the theory that if the appellant's track was out of repair and imperfect through its own neglect, and that in consequence of such imperfect condition of its track Samuel Bitzer lost his life, that still the appellee was not

entitled to recover, because the said Bitzer was a coemployee of the appellant's employees. This theory is based upon the agreement set out in the record between the New Jersey Railroad and Transportation Company, the Camden and Amboy Railroad and Transportation Company, the Philadelphia and Trenton Railroad Company, parties of the first part, the Philadelphia, Wilmington and Baltimore Railroad Company, the appellant of the second part, and the Baltimore and Ohio Railroad Company, of the third part. This agreement was entered into for the purpose of securing comfort, speed, and safety in the through passenger travel between New York and Washington, and to secure harmony of action between said parties to accomplish that object. Whatever effect this agreement might have upon the parties to it, it could not have any upon strangers to it, nor alter nor change the relations of either of them towards third parties, *nor have the effect of making those who were employed and paid wages by either of the contracting parties, the coemployees of the agents and workmen of the other parties.*"

The foregoing case is well annotated by the editor of 10 Am. and Eng. R. R. cases, where it is reported at page 792, and a number of cases deciding the same point are cited, and is discussed in 12 Am. and Eng. Encyclopedia of Law, at page 993.

III.

A Mere Arrangement Between Railroad Companies for the Joint Use of the Tracks of Either of Them Does Not Make the Employee of One of the Companies a Fellow Workman With the Employees of Another of the Companies.

"Mere cooperation or community of labor and ultimate purpose is not enough to make men fellow servants. They are not fellow servants *unless they are all under the control of a common master.* Wherefore a servant of a railroad company

employed in its service upon a section of road used by it in common with another corporation under a mutual contract between the companies may recover damages against that corporation for injuries sustained by reason of the negligence of its servant. And where one corporation hires from another the use of its track, a servant of the former can recover from the latter for any injury caused by defects in the track."

Shearman & Redfield on Negligence, 130, sec. 101.

Snow *vs.* Housatonic Railroad Co., 8 Allen (Mass.), 441.

Strader *vs.* The N. Y. L. E. and Western R. R., 86 Hun, 613.

Graham *vs.* N. E. R. R. Co., 114 Eng. Com. L. Rep. (18 C. B., N. S.), 229.

Sawyer *vs.* Rutland R. Co., 27 Vermont, 370.

Warburton *vs.* Gt. Western R. R. Co., 2 Exch. 30.

Smith, Admr., *vs.* The N. Y. and Harlem R. R. Co., 19 N. Y. 127.

Snow *vs.* Housatonic R. R., above cited, was decided in 1864. In that case an agreement existed whereby the tracks and switches of the defendant company might be used by the Western R. R. Co. at a point where the two roads intersected. Plaintiff was employed by the Western R. R. Co. to attend to the switches upon the defendant's road at this point and to make up and distribute trains for the Western Railroad. At a place where the defendant's road crossed the highway three planks had been laid down between its tracks. One of these planks had become so defective that there was a hole large enough to admit a man's foot. Plaintiff had called the attention of the defendant's track repairer to it, but it was not repaired. Subsequently, through no fault of

plaintiff, the latter's foot was caught in the hole and the wheel of a freight car passed over it. It was contended that as the track was in the joint occupation of the two companies when the Western Railroad Company sent the plaintiff to work there they sent him to work on their own road, and, consequently, the person whose duty it was to repair the defective planking was a fellow servant with plaintiff. The court (Bigelow, C. J., delivering the opinion), at page 444, said:

The only connection shown to exist between the parties to this suit is, that the corporation by which the plaintiff was employed had a right to use a portion of the tracks of the railroad belonging to the defendants for certain specific purposes, by virtue of a contract the precise terms of which are not declared, and the plaintiff, when the accident happened, was actually engaged in using one of these tracks in making up freight trains, which was one of the objects for which the defendants allowed their road to be used under the contract referred to. On these facts it is difficult to see how the doctrine applicable to a claim for damages occasioned by the carelessness of a fellow servant against a common employer can have any bearing upon the rights of the parties to this action.

The case is not unlike that put by way of illustration in Farwell *vs.* Boston and Worcester Railroad, 4 Met. 49–61, of a railroad owned by one set of proprietors, whose duty it was to keep it in repair, and used by another set of proprietors with engines and cars paying toll to the owners of the road.* In such case the intimation of the court is very strong that a servant in the employment of the last named proprietors would have an action against the former for an injury caused by the negligence of one of their servants.

*Just as the Metropolitan Company *paid toll* to the Great Falls Company in the form of all fares collected on the latter road as a consideration for permitting it to carry its, the Metropolitan, passengers to the District line without charge.

Referring to the case in Metcalf, above cited, we find the language of the court in the case stated to be as follows:

> "We are inclined to the opinion that the engineer (of the corporation owning the engine) might have a remedy against the railroad corporation; and if so, it must be on the ground that as between the engineer employed by the proprietors of the engines and cars, and the switch tender employed by the corporation, the engineer would be a stranger between whom and the corporation there could be no priority of contract, and not because the engineer would have no means of controlling the conduct of the switchman."

See, also—

Graham *vs.* The N. E. R. Co., 114 Eng. Com. L. Rep. 229, and a note to that case.

> "The employee of one railroad company who, in the course of his employment, is obliged to run over the lines of another company, and while so engaged to subject himself to the orders of the latter company, is not thereby precluded from receiving damages from such latter company for injuries sustained in consequence of the negligent acts of its employees."

Hart v. N. Y. & R. Co., 68 App. Div. 400, citing Smith *vs.* N.Y. H. R. R., 19 N. Y. 127.

Sullivan *vs.* Tioga R. R. Co., 44 Hun, 304, affirmed in 112 N. Y. 643.

Tierney *vs.* S. B. & N. Y. R. R. Co., 85 Hun, 146.

In Carroll *vs.* Minnesota Valley R. R. Co., 13 Minn. 30, it was held that if two corporations engaged in conveying passengers and freight over an entire route run their conveyances so as to connect at the common terminus of both lines, and sell tickets over the entire road, but keep

the *fares and freight for each portion distinct* (just as the two companies at bar kept their fares distinct) there is no such legal identity between them as will prevent an employee of one of them from maintaining an action against the other for an injury done through the negligence of the latter's servant.

In Catawissa R. Co. *vs.* Armstrong, 49 Pa. St. 186, the Catawissa Railway Company had an arrangement with the Philadelphia and Erie Railway Company, whereby the former company had the right to use the road of the latter. Armstrong, an employee of the Philadelphia and Erie Company, was killed by the negligence of the employees of the Catawissa Company, *held* that they were not fellow servants. In Warburton *vs.* The Great Western R. Co., 2 Exch. 29–31, it is said that the ground upon which the fellow servant doctrine proceeds is that :

> "It must be presumed that a servant takes upon himself the risk of any injury he may sustain by the negligence of another servant under the *same master* and in the same employment, and that such a risk is part of the consideration for the wages which he is entitled to receive."

In that case it was, therefore, held that where plaintiff, a porter in the employ of the L. Co., at their Manchester station, and the defendant, the G. W. Co., both used the station, and that their servants, whilst within the station, were subject to the rules of the L. Co. and to the control of their stationmaster, and plaintiff whilst engaged in his usual employment in the station was injured by the negligence of the defendants' engine driver, the plaintiff and defendant were not fellow servants.

So in Wisconsin it is held that employees of the lessee company are not coservants of employees of the lessor company, *although subject to the orders of the latter while running on the lessor company's road.* Phillips *vs.*

Chicago, etc., R. Co., 64 Wisconsin, 475; S. C. Am. and Eng. R. R. Cas. 453.

The rule that the comman master of several servants, employed in the same service, is not responsible for an injury to one of said servants caused by the negligence of another, while engaged in a common employment, has no application to a case of common employment alone, *without proof of common master.* Stevenson vs. Atlantic, etc., S. S. Co., 33 N. Y. Supr. Ct. 277.

A case almost on "all fours" with the case at bar (if the facts be as the defendant contends) is that of Ziegler *vs.* Danbury and Norwalk R. R. Co., 52 Conn. 543. In that case the D. & N. and the S. railroads connected, forming a continuous line. By an arrangement between the two companies a train owned and run by the S. Co. went over both roads to a certain point and back daily, the D. & N. Co. paying the S. Co. monthly an agreed price for the service upon its road. The train when on the road of the D. & N. Co. was under its general control and governed by its rules, and it had *entire control of the hands upon it;* but the S. Co. was at liberty to use what engine and employ what hands it pleased. The plaintiff was a brakeman on this train and was injured by a collision with a train of the D. & N. Co., on its own road, caused by the negligence of the conductor of that train. Held, that the plaintiff was not an employ of the D. & N. Co., and that the conductor of the other train was therefore not his fellow servant. In the foregoing case if we let the S. Co. represent the Metropolitan Company and the D. & N. Co. the Great Falls Company, we will readily see how nearly identical the facts are in the two cases.

In Swainson *vs.* North Eastern R. Co., L. R. 3 Exch. Div. 341, the stations of two railroad companies closely abutted. The plaintiff was a signalman, employed by but one of the companies, and in its uniform. He discharged his duties, however, in connection with the trains of *both*

roads, and was injured by the negligence of the employees of the other company. He brought an action against said company, and it was strenuously argued that the negligence in question was that of a fellow servant. The court, however, decided the contrary, and the plaintiff recovered.

In Svenson *vs.* Atlantic Mail S. S. Co., 57 N. Y. 108, plaintiff while employed upon a barge, which was engaged in lightening a steamship, was injured through the negligence of one engaged upon the steamship in discharging her cargo. In an action to recover for the injury, defendant's answer admitted that at the time of the accident defendant owned and had the control and the management of the steamer; the barge was not owned by the defendant, and plaintiff was employed and paid by its master. Held, that the proof, together with the admission in the answer was sufficient to authorize the jury to find that the man who caused the injury was a servant of the defendant and working for it at the time; and that he and the plaintiff were not fellow servants.

In Connoly *vs.* Davidson, 15 Minn. 428, while two steamers were near each other the boiler of one exploded, thereby injuring a deck hand on the other. Held, that the rule that the master is not liable to one of his servants for injuries sustained by him through the negligence of a fellow servant did not apply, though the defendant was a *partner* in the business of running *both* boats.

That courts are not inclined to extend the fellow servant doctrine any further than it at present exists is shown by the author of Patterson's Railway Accident Law at page 372, where it is said (citing authorities for each proposition) that:

> "The rule does not bar recovery by servants of another railway who have come upon the line or premises of the defendant railway in the performance of their duty to that other railway; nor does the rule bar recovery in the case of a servant of

a railway for injuries caused by the negligence of the servants of another railway in the exercise of running powers by the latter railway over the line of the first mentioned railway; nor, in the case of the servant of a connecting steamboat line who is similarly injured; nor does the rule bar a recovery from the railway by a servant for injuries caused to that servant's wife by the negligence of a fellow servant. If the relation of service is terminated, the ex-servant is not barred from recovering for injuries caused by his late fellow servants; a servant employed by the day who is injured after he has finished his day's work, or at a time when he is not in the service, is no longer a fellow servant of another servant by whose negligence he is injured."

"It is immaterial for the purposes of the general rule that both companies employ the same person as superintendent."

Galveston, etc., R. R. *vs.* Croskell, 6 Tex. Appeals, 160.

With respect to joint use of premises by two or more railroad companies not making their respective employees coservants, see presentation of the authorities in editorial note to Hardy *vs.* Sheddon Co., 37 L. R. A. 61.

IV.

In the Case at Bar the Contract Between the Companies, if Any Existed, and Whatever Its Terms, Was Entirely Oral. It Was, Therefore, For the Jury and Not For the Court to Say Whether in Fact Any Contract Existed and What Were Its Terms.

Said Mr. Chief Justice Cooley, in McKenzie *vs.* Sykes, 47 Mich. 294, 295:

"It is for the court to interpret the written contracts of parties, for when they have assented to definite terms and stipulations and incorporated

them in formal documents the meaning of these, it is supposed, can always be discoved on inspection; nothing which is within the purview of the contract is left in doubt, and there is, of course, nothing to submit to the jury. But where the terms of a negotiation are left to *oral proofs*, the question what the parties said and did and what they intended should be understood thereby, is single and can not be separated so as to refer one part to the jury and another part to the judge; but in its entirety the question is one of fact.

"When the terms of the contract are controverted, or it is susceptible of more than one meaning, it should be submitted to the jury to ascertain its terms and meaning with a hypothetical instruction as to the law."

Cyclopedia of Law and Procedure, vol. 9, p. —

Where the contract is partly in writing and partly oral its construction is for the jury.

Goddard *vs.* Foster, 17 Wall. 123, 142.

Whether the facts be disputed or undisputed, if different minds may honestly draw different conclusions from them, the case is properly left to the jury.

Railway Co. *vs.* Stout, 17 Wall. 657.
Herbert *vs.* Ford, 33 Maine at 93.
Farley *vs.* Pettes, 5 Mo. App. 262.
White *vs.* Murtland, 71 Ill. 250.
Waltheim *vs.* Artz, 70 Iowa, 609.

It is clear, therefore, that even if the witness had been *our* witness as to the terms of the contract, we, even in that case would have been entitled to argue to the jury as to our construction of the witness' testimony and what it showed the terms of the contract to be, *a fortiori* such would be the case where the witness was adverse. It was not for the court to say what the witness *meant* by his testimony, that was exclusively the function of the jury.

V.

The Attempted Practical Combination of These Roads by Means of a "Holding Company" and the Resulting Alleged Trackage Arrangement Are in Violation of the Anti-Trust Act.

Undoubtedly this combination by means of a holding company and the alleged trackage arrangement are in contravention of the act of Congress of July 2, 1890 (26 St. L. 209), commonly known as the anti-trust act, and has been recently enforced in the case of the Northern Securities Company *vs.* The U. S., 193 U. S. 197, in which it was held—

> "Every combination or conspiracy which shall extinguish competition between otherwise competing railroads engaged in interstate trade or commerce, and which would in that way restrain such trade or commerce, is made illegal by the act."

The act above referred to, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," provides in its third section that—

> "Every contract *combination* in form of trust or otherwise, or conspiracy, in restraint of trade or commerce, in any territory of the United States *or of the District of Columbia*, or in restraint of trade or commerce between any such territory or territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, *is hereby declared illegal.*"

The suburban lines of the District of Columbia either run into the State of Maryland or connect with lines that run into that State. The Metropolitan Railroad Company, through the instrumentality of a "holding company" (if the contention of defendant's counsel be correct) has so combined these lines under one control

that all competition between them has been destroyed. They can, if they have not already done so, control the labor market in the employment of conductors and railroad operators, and can place such restrictions upon the traffic of any of the lines and do many other acts in restraint of trade upon one or the other of these roads by bringing them all under one control as to bring the "combination" in plain conflict with the said act of Congress.

Under the first clause of the section just quoted it is not necessary that the combination be with any other than District lines, though as a matter of fact the combination is not only with District lines but with Maryland lines also, thus making it obnoxious to both clauses of the section.

To prove that a combination or monopoly exists within the meaning of the act it is not necessary to show that the immediate effect of the acts complained of is to suppress competition or to create a complete monopoly. It is sufficient to show that they *tend* to bring about these results.

People *vs.* North River Sugar Ref. Co., 54 Hun, 377.

United States *vs.* E. C. Knight Co., 156 U. S. 1.

Addyston Pipe Co. *vs.* United States, 175 U. S. 211, 23.

Central Ohio Salt Co. *vs.* Guthrie, 35 Ohio St. 672.

The very existence of a power to restrain trade constitutes a restraint.

United States *vs.* Joint Traffic Assn., 171 U. S. 505, 571.

United States *vs.* Trans-Mississippi, 166 U. S. 290.

Addyston Pipe Co. *vs.* United States, 175 U. S. 211.

Pearsall *vs.* Great Northern R. Co., 161 U. S. 646.

It is not necessary in order to bring a combination or

conspiracy within the operation of the act that the members bind themselves each with the other to do the acts alleged to be in restraint of trade. It has always been held to be enough that they act together in pursuance of a common object, and while of course this presupposes an agreement between them in a broad sense, an agreement or contract in the technical sense is not at all essential.

Regina *vs.* Murphy, 8 Can. & P. 396.

If in point of law the effect or the tendency of the combination is to restrain trade or commerce the combination is unlawful and the motive behind it, however beneficial, does not alter the fact in the slightest degree.

United States *vs.* Trans-Missouri Freight Assn., 166 U. S. 341, 342.

Addyston Pipe Co. *vs.* United States, 175 U. S. 234.

Chesapeake & Ohio Fuel Co. *vs.* United States, 53 C. C. A. 256.

Ownership of a majority of the stock constitutes the control of a corporation, when the inquiry is whether a combination or monopoly has been formed to stifle competition between two or more rival and competing railroads.

Noyes Intercorporate Relations, 294.

Farmers Loan and Trust Co. *vs.* New York & N. R. Co., 150 N. Y. 410.

People ex rel. Peabody *vs.* Chicago Gas Trust Co., 130 Ill. 268.

Pearsall *vs.* Great Northern R. Co., 161 U. S. 646–671.

Harding *vs.* American Glucose Co., 182 Ill. 551.

The purchase by the Washington Traction and Electric Company (*the holding* company) of a controlling interest

in the eight District and Maryland railroad companies and the election of one individual as president of all of them, another as vice-prerident, another as secretary, etc., constitutes a "*combination* in the form of a trust" within the meaning of the statute.

Beach, Monopolies & Industrial Trusts, sec. 159.
Noyes Intercorporate Relations, secs. 310, 393.
People ex rel. Peabody *vs.* Chicago Gas Trust Co., 130, Ill. 268.
Harding *vs.* American Glucose Co. 182, Ill. 551.

"To monopolize" signifies the *combining* or bringing together in the hands of one person, or set of persons, of the control of, or the power to control, several rival and competing businesses, to the end that competition may be suppressed.

United States *vs.* E. C. Knight Co., 156 U. S. 1.
United States *vs.* Trans-Missouri Freight Assn., 166 U. S. 290.

Because a person has the right to purchase stock it does not follow that stockholders of two or more competing corporations can combine among themselves and with such person to sell him their stock and induce others to do the same so as to center the controlling stock interests of the several corporations in a single head, in violation of statutes against combinations, consolidations, and monopolies.

Noyes, Intercorporate Relations, sec. 36.
Penna. R. Co. & Com. (Pa.), 7 Atl. Rep. 373.

Mr. Lackey, the secretary of the Washington Traction and Electric Company, says "it (the said company) was nominally the owner" of these various roads (Rec. p. 17). "It owned a majority of the stock" (Rec. p. 18). This holding company owning a majority of the stock of

all these companies elected its own president, vice-president, secretary, board of directors, etc., to the corresponding offices in each of them. It was as complete a "combination" for all the purposes of destroying competition among them as if they had been actually consolidated, and was clearly within the anathema of the act of Congress. This being so, the "informal arrangement" (Rec. p. 21) whereby these companies were to be understood as acting as one company when a man was employed as conductor, and that he was not to be understood as employed to work for any particular company but to work for all and to be a fellow servant with all the other employees of any road that the "combination" chose to make him a fellow servant of, was clearly "a combination in form of a trust" and illegal.

It is not necessary that it, the combination, shall be in "restraint of trade," if the combination be of corporations in the District of Columbia. The statute declares "every . . . combination in form of a trust . . . in the District of Columbia . . . shall be illegal." In other words, if the "combination" of corporations in the District of Columbia be "in the form of a trust," though it be not in restraint of trade, it is illegal. It is also illegal if it be a combination between corporations in the District and those outside the District *if* it be in restraint of trade. This consolidation or "combination" was therefore obnoxious to both clauses of the section. Being illegal it could not make Dye and Looney fellow workmen.

> "While a *written* trust agreement between the stockholders is a usual element of the trust combination, *it is not an essential one.* It is sufficient to show that the stockholders acted in pursuance of any understanding, plan, or scheme, written, *verbal*, or otherwise."
>
> Harding *vs.* American Glucose Co., 182 Ill. 551.

So, in the case at bar, the fact that the owner of the majority of the stock in each of the companies is the *holding* corporation, and that the president of that corporation is made by its vote president of all the other corporations, at once dispenses with the necessity of any contract, written or oral, between the different companies as to their manner of dealing with each other. The holding corporation "is the whole thing." Its president carries in his breast all the "understandings" of all the companies. It is in other words an "understanding" with himself. As *he wishes* them to act so they act. If it be necessary that the action shall be taken by the board of directors, it is the board of directors of the holding company that acts. Of course, no written *contract* is necessary with such a scheme in operation, because an individual can not make a contract *with himself*. Nor can the various companies compete with each other any more than a man can compete with himself. The "scheme" is at once, ipso facto, a suppression and destruction of competition, and any scheme which does that is a scheme "in restraint of trade." In other words, a "trust" within the statute.

United States *vs.* E. C. Knight, 156 U. S. 1.
United States *vs.* Trans-Missouri Freight Asso., 166 U. S. 290.

The deceased and the conductor can only be made fellow workmen by fiction of law. In no other sense can it be contended that they were such, but "fictions of law invented to promote justice, can never be invoked to accomplish injustice."

Mostyn *vs.* Fabrigos, Cowp. 177.
Morris *vs.* Pugh, 3 Burr, 1243.

Summary.

Summarizing, we submit that the action of the court in instructing the jury to return a verdict for the defendant was erroneous for any one of the following reasons:

I.

Because the alleged trackage agreement was not in conformity with the statute and was consequently void and could not have the effect of making the deceased a fellow workman of the conductor of the Metropolitan car.

II.

Because, even if made by the board of directors of the respective roads, it could go no further than the statute authorized. It could not make a *lease* of the cars of one company to another, much less of the employees of any one company to another company.

III.

Because, even were there no statute on the subject, a lease of the property of a corporation can only be made at a regularly called stockholders' meeting.

IV.

Because, even if the arrangement was entirely valid and binding on the companies, it could not be so as to the workmen, who were not in privity with it. Bitzer's case, 58 Md. 372, and other cases cited in our brief.

V

Because even had any such agreement as defendant contends existed between the two companies, the Metropolitan car could not have become a Great Falls car, until after the running machinery of the car had been so adjusted as to fit it to run upon the Great Falls line by the overhead wire. This adjustment *had not been completed* and it was therefore still a Metropolitan car (see page 10 of brief).

VI.

Because a mere arrangement between two railroad companies for the joint use of their roads can not make the employees of the respective roads fellow servants. Sherman and Redf. on Neg. 130, sec. 101, and cases cited in our brief.

VII.

Because the evidence of the contract, if there were one, was entirely oral, and it was for the jury, and not the court, to say whether such a contract actually existed, and if so, what were its terms.

Cooley, J., in McKenzie *vs.* Sykes, 47 Mich. 294.
Goddard *vs.* Foster, 17 Wall. 123–142.
R. R. Co. *vs.* Stout, Id. 657.

VIII.

Because, whether the fact that *a contract* existed be disputed or not, if different minds may honestly differ as to the conclusions to be drawn from the witness Lackey's testimony in regard to it, the question of the terms of the contract should have been left to the jury. Railroad Company *vs.* Stout, 17 Wall. 657.

IX.

Because the combination of these roads, in the manner shown in the testimony, viz, the ownership of the majority of the stock by the *holding* company was illegal and conferred no right on any company to control the workmen of any other company in such manner as to make them fellow workmen. Act of Congress of July 2, 1890. The "Anti-trust Act," and cases cited *ante*.

Respectfully submitted.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 173.

MARIAN Y. LOONEY, ADMINISTRATRIX, PLAINTIFF IN ERROR,

vs.

THE METROPOLITAN RAILROAD COMPANY AND THE WASHINGTON RAILWAY AND ELECTRIC COMPANY, DEFENDANTS IN ERROR.

BRIEF FOR DEFENDANTS IN ERROR.

J. J. DARLINGTON,
For Defendants in Error.

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Statement.

The action below was to recover damages for the death of the plaintiff's intestate, through alleged negligence of the defendants. The trial court, at the conclusion of the testimony offered by the plaintiff, directed a verdict for the defendant and entered judgment upon it, which judgment was affirmed by the Court of Appeals of the District of Columbia, and is now before this court upon writ of error.

The defendants are street-car companies, whose lines connect at Thirty-sixth street and Prospect avenue. The Metropolitan Company operates an underground system, by means of a plow projecting through a slot rail to a conductor bar, below the surface

of the street, by contact with which electric motive power is supplied to the car, while the Electric Company operates an overhead system, by means of a trolley.

By the act of Congress of August 2, 1894, 28 Stats. at Large, 217, authorizing the Metropolitan Company to install its system, that company was required, upon its completion, to enter into reciprocal trackage arrangements with connecting roads, upon schedules and terms of compensation, to be mutually agreed upon, or, in default of agreement, to be determined by the Supreme Court of the District of Columbia. The act of June 11, 1896, provided, further, that any suburban line may have its trail cars transported by any connecting urban company over the lines of the latter, the schedule, kind, and number of such cars, the compensation therefor, and all other matters relating thereto to be in like manner mutually agreed upon, or determined by the said courts, and with a proviso that under neither of the said acts should any company collect fares except from passengers boarding the cars on its own lines.

At and for some time prior to June 28, 1901, a majority of the stock of each of the defendants, and of six other intersecting street-car companies in the District of Columbia, was held by a company known as the Washington Traction and Electric Company, which company, however, had no authority to operate street-cars and operated none (Rec. pp. 17, 18). For economy of operation, one person was president, another was secretary and treasurer, another was roadmaster, and another was assistant roadmaster of each of the eight companies. No one of these companies had any interest in the property of any other company, the officers were paid from the separate funds of the several companies, each kept a separate bank account, they were not consolidated, but simply had an operating arrangement with each other (Rec. p. 20).

In the year 1900 a mutual trackage arrrangement was made between the defendant companies for the purpose of complying with the trackage enactments above mentioned (Rec. pp. 20, 21), under which, when the cars of the Metropolitan Company had reached its western terminus at Thirty-sixth street and Prospect avenue and at its point of connection with the line of the Electric Company, they, with their crews, consisting of a conductor and a motorman, were turned over to the latter company, which paid the former a mileage rental for the cars, and paid the crews directly for their time and service upon its lines, they charging the time that they worked for each company against that company. The conductor collected fares for the Metropolitan Company until he reached its terminus, keeping a separate account of them, and accounting to it for them, after first deducting from them the pay of himself and the motorman for their time on its lines. Immediately upon leaving its lines and entering upon those of the Electric Company on Prospect street, it became a Great Falls car—that being the name of the Electric Company at that time—the conductor collecting fares for all passengers boarding the car while on its lines, keeping a separate account of them, and accounting to it for them, after deducting from these fares the pay of himself and the motorman for the time they served on its lines (Rec. pp, 19, 20, 21–6).

The operating force, the plaintiff's intestate included, were employed by Mr. Shaffer, who was assistant roadmaster for the eight street car companies, and who, called as a witness by the plaintiff, testified that the men were not employed to work for any particular companies, but for any and all of them, as occasion might require or as he might direct; that for some time before and up to the day preceding the accident, the plaintiff's intestate had been working on the lines of the Bright-

wood Railway Company, but that, on the preceding day, he had asked for some extra work to do, in addition to the Brightwood work, and witness had sent him to the plow-pit at Thirty-sixth street and Prospect avenue, and that all the pitmen were under his charge and required to go to any of the pits on the respective roads to which he might order them (Rec. pp. 27, 28). The witness, Leckey, testified that the plaintiff's intestate knew he was employed to work for any one of the companies (Rec. p. 19), and the testimony of Hazel (p. 12) and Kirk (p. 14), ex-employees of the defendants, called by the plaintiff as witnesses, shows that this was a matter of common knowledge among them.

The plow-pit on which the accident happened, as alleged in each count in the declaration, and as is undisputed in the testimony, was in Prospect avenue, on the lines of the Great Falls or Electric Company, west of the terminus of the Metropolitan Company, and was reached by the cars by gravity, without the aid of the electric motive power. At the time of the accident, ~~therefore~~, the car with which it was associated had left the lines of the Metropolitan Company and was over the pit. The plow, which alone could be used on the lines of that company, had been removed, incapacitating it for service upon its lines, over which alone it was engaged in operating cars, or was authorized by its charter to do so, and the plaintiff's intestate was engaged in adjusting the "leads" or wires necessary for the operation of the car over the Electric Company's lines, by means of the overhead trolley, when he was heard to groan, and, according to the testimony, it was found that the trolley was in communication with the overhead wires which span that company's lines, admitting current to the pit. Even with the current on, however, there would be no danger unless there was a "leak" in the leads, of which there was no evidence, or unless the plaintiff's intestate took hold of

them, not "at the right place," but at a point where it was necessary for them to be uninsulated (Rec. pp. 12–13). It is not necessary to touch the uninsulated part in making the connection (Rec. p. 14).

The testimony of Dr. Glazebrook, the coroner, who performed an autopsy on the body of the plaintiff's intestate on the day following the accident, shows that the only burns or evidences of injury were not on the hands, but below the shoulder bone on the back of body; that these were evidently electric burns, and that there were burns on the corresponding parts of his clothing. A witness (Anderson) testified that a person might come in contact with a live wire and receive a shock sufficient to kill without receiving a burn at the point of contact; but, on cross-examination, he admitted that this was contrary to all his observation and knowledge, and was simply a theory of his own (Rec. p. 14).

There was no testimony that it was customary, necessary, or usual for the conductor to prevent the trolley from coming into contact with the overhead wires while the leads were being adjusted. The witness Kirk, at page 14, states that, if the trolley is on before the plow is disconnected and removed, it will be charged with the full voltage on the line; but all the testimony as to the accident agrees that the plow had been disconnected and removed, and the plaintiff's intestate was engaged in adjusting the wires, or leads, to connect with the overhead trolley when it occurred (Rec. pp. 10–11).

The witness Anderson, at page 14, gave it "as his opinion, as an expert," that it would be the duty of the man in charge of the car to keep the trolley off the wire until he received a signal from the man beneath the car, but neither he nor any other witness testifies that this is usual, or necessary, or regarded as required by reasonable or ordinary care generally, or by reasonably prudent men engaged in that or the like business.

What any fellow operative, after an accident has happened, may testify to, not as to the ordinary or reasonable care exercised or regarded as usual, necessary, or proper to be observed by prudent men in the same business, but as to his expert opinion, merely, can hardly be urged as a criterion to be submitted for the guidance of a jury in cases like the present. No authority is cited, or can be, for such a test of liability.

That, regardless of any duty to be performed by the conductor, danger was known and recognized as liable to be encountered, is shown by the testimony that rubber gloves were provided for the pitman at each of these plow pits (Rec. p. 18). Notwithstanding the effort to avoid the effect of this fact by the claim that it is not customary to use these gloves except on rainy days, the fact remains, and is conclusive, either that current was liable to exist in the pit, independently of performance by the conductor of any duty supposed to be incumbent on him, or else that possible neglect or prevention of the performance of that duty by him was to be anticipated and provided against. Perspiration as well as rain increased the danger from electricity, and this was a bright, sunshiny day, in the latter part of June.

Upon this state of the evidence, at the close of the plaintiff's case, a motion was made to direct a verdict for the defendant, on the ground that the plaintiff's intestate and the car conductor at the time of the accident were fellow employees, and upon the further ground that there was no evidence sufficient for submission to the jury that the death of the former was due to negligence on the part of the latter. The motion was granted, it is said, principally upon the former ground, but properly, it is submitted, upon either of them.

Points and Authorities.

Of the assignments of error, the first, third, and fourth present propositions which are not in the case.

Neither the trial court nor the Court of Appeals held that the plaintiff's intestate was a fellow servant of the conductor of the Metropolitan Company. The testimony, unconflicting and undisputed, showed that the men who composed the operating force were not employed by the Metropolitan Company, but by the assistant roadmaster of the eight companies, for service indiscriminately upon any and all of them, as he might from time to time direct, and that they were paid by each of the companies, separately, for the time of their service upon its lines. The only possible alternate result would be that they were all servants of the eight companies, as common employers, or that each of them was, for the time being, the servant of that company upon whose lines he was, for the moment, employed, and by which he was then being paid. Under the former of these constructions, both the plaintiff's intestate and the conductor were fellow servants of their common employers, while, under the second of them, both were fellow servants of the Electric Company at the time of the accident. A common employee of two companies can not recover for injuries caused by the negligence of fellow servants. B. & O. Ry. *vs.* Voight, 176 U. S. 498, 513. And that the same rule applies as between fellow servants of the same company is not open to controversy.

With respect to the third and fourth of the assignments of error, the trial court, as pointed out in the opinion of the Court of Appeals at p. 36, made no ruling as to the validity of the contract for mutual trackage between the defendant companies, and the opinion of the Court of Appeals, at p. 34 of the Record, declares that it would seem absurd to make the rights, duties,

and liabilities of the employees depend upon the special terms of that agreement. The only contract material to the present inquiry, which is to determine whether the decedent and the conductor were fellow employees, is their contract of employment, and, as to the terms of that contract, there is no question or room for controversy. It was an unquestionable fact in the case that the men employed to operate the cars, the decedent included, were to work upon the lines of any and all of the eight companies, as they might from time to time be ordered by the roadmaster, and that they knew this.

The second assignment of error, namely, that the trial court erred "in not submitting to the jury the question as to what were the terms of the unwritten contract, and whether, in fact, there was such a contract," is equally irrelevant to any issue in the case, upon the ground last stated, and, in addition, is wholly unmaintainable as a proposition of law.

The proof as to the contract, and as to its terms, was given by witnesses called for the purpose on behalf of the plaintiff, and in response to questions propounded to them by her counsel; there was no attempt to impeach them, their testimony was not contradicted in any way, nor was there any evidence before the jury, other than that of these witnesses, upon which it could have determined the existence or terms of the contract, even if these had been a material inquiry in the case. The criticism of the agreement between the companies, made at pages 9–12 of plaintiff's brief, amounts to this: That, if the Electric Company, at the point of connection, took the passengers of the Metropolitan Company upon another car, in charge of its own motorman and conductor, and without further charge to the District line, the car and crew would be its own, and there could be no liability upon the part of the Metropolitan Company; but if, instead of this, the Electric Company arranged to

rent the car of the Metropolitan Company from the point of intersection, took it upon its own lines, and employed, paid, and controlled the crew as its own from that time until the car left its lines and returned to those of the Metropolitan on the return trip, then the arrangement was merely "fictional," for the purpose of enabling the Metropolitan Company to escape liability for the negligence of its conductor.

With respect to the proposition, urged at pp. 15–17 of the opposing brief, that the mutual trackage arrangement could not make the employees of the respective companies fellow servants of each other, i. e., if they were in fact the employees of respective companies, nothing need be said, for the reason that no such ruling was ever contended for by the defendants in error, nor made by either of the lower courts. The case of R. R. Co. *vs.* State, use of Bitzer, 58 Md. 372, moreover, does not tend to support the proposition for which it is cited, the doctrine of fellow servants being held inapplicable in that case, at page 401, for the reason that—

> "Samuel Bitzer was not employed or paid by the appellant, but was employed by the Baltimore and Ohio Railroad Company, and therefore this principle (that employees of defendant were coemployees of Bitzer) is not applicable to him."

The quotation from Shearman and Redfield, at pp. 17 18 of the brief, lacks relevancy, because in the case at bar there was no use or hiring by either company of the tracks of the other, to which condition of joint use, only, the citation refers.

In Snow *vs.* Railroad Co., 8 Allen 441; Graham *vs.* Railroad Co., 114 E. C. L. 229; Sullivan *vs.* Railroad Co., 112 N. Y. 643; Sawyer *vs.* Railroad Co., 27 Vt. 370, 380; Carroll *vs.* Railroad Co., 13 Minn. 30; Warburton *vs.* Railroad Co., 2 Ex. 30; Smith *vs.* Railroad Co., 19 N. Y. 127; Tierney *vs.* Railroad Co., 85 Hun. 146; Railroad *vs.*

Croskell, 6 Tex. Civ. App. 160; Railroad Co. *vs.* Armstrong, 49 Pa. St. 186; Phillips *vs.* Railway Co., 64 Wis. 475, 486; Svenson *vs.* Steamship Co., 33 N. Y. Supr. Ct. 277, 290, affirmed in 57 N. Y. 108; Ziegler *vs.* Railroad Co., 52 Conn. 543, 554, and Swainson *vs.* Railroad Co., L. R. 3 Exch. Div. 341, there was no feature of a common employment, the employee injured and the employee through whose negligence it was claimed the injury occurred being employed, paid, and controlled, each by the particular company whose servant he was. These cases, comprising nearly all the citations in the opposing brief, are decided distinctly upon that ground, and, therefore, afford no possible authority for a case in which the injured and injuring employee were the servants either of two common employers, having equal connection with their employment, payment, and control, or at the time of the accident, servants of the same employer, by whom they were paid and controlled; and, as above pointed out, the case at bar can present only one or the other of these possible alternatives.

In Farwell *vs.* Railroad, 4 Metc. 49, 59, cited at pp. 19 and 20, the negligent and the injured employee were concededly the fellow servants of a single employer. The case is referred to in the brief simply as throwing some light, by one of the illustrations used in the opinion, upon the case at bar; and, to get the latter within the range of such supposed illumination, it is found necessary to assume, in departure from all the evidence in the case, that the "Metropolitan Company *paid toll* to the Great Falls Company in the form of all fares collected on the latter road as a consideration for permitting it to carry its, the Metropolitan, passengers to the District line without charge;" it being an undisputed fact in the testimony that the Great Falls, not the Metropolitan Company, employed, paid, and controlled the crew for all the time that the car was upon its line, also renting the

car itself from the Metropolitan Company for that period.

In Hart *vs* Railroad Company, 68 N. Y. App. Div. 400, cited at p. 20, although the plaintiff, employed by one railroad company, was, for the time being, and while on its line, under the direction of the defendant's superintendent, he was held not to be a fellow servant, because he was still in the service only of his own company, and his own superintendent was without power to discharge known incompetent and negligent employees of the defendant company. In the case at bar, the reverse of both these conditions was true; the alleged negligent conductor was in the employment, service, and pay of the same company which employed and paid the plaintiff's intestate, and the superintendent or roadmaster of the latter employed, controlled, and had the power to discharge the conductor.

Ziegler *vs.* Railroad Co., 52 Conn. 543, 554, cited in the opposing brief as "almost on 'all fours' with the case at bar," was decided upon the following ground:

> "The plaintiff sustained no contract relation whatever with the defendant. For that reason, there is no room for any presumption that he stipulated with the defendant to assume any risk arising from the negligence of its employees."

The case at bar, without dispute or controversy in the evidence, presents just the reverse of this condition, and, therefore, can be said to be "almost on 'all fours'" with the case cited only because it is so totally dissimilar. *Lucus a non lucendo.*

Connoly *vs.* Davidson, 15 Minn., 428, cited at page 23, holds, only, that the fact that A owns a part interest in two steamboats does not make the crews of each fellow servants.

In Strader *vs.* Railroad Co., 86 Hun. 613, the mutual trackage or traffic arrangement between the Boston Com-

pany and the Erie Company was that the Boston Company might enjoy, jointly with the Erie Company, the defendant, the use of the tracks of another railroad which had been leased by the Erie, paying, not to the employees, but to the Erie, a stipulated proportion of the rents, expenses of maintenance, and wages of operatives, the operation, however, to be under the control of the superintendent of the Erie. The plaintiff, an employee of the Boston Company, injured through the negligence of an Erie switchman, and suing the Erie Company, was held not to be a fellow employee of the switchman, because the latter—

> "was hired and paid by the defendant, and was under the exclusive direction of its superintendent. The Boston Company had no voice in his selection, and could neither discharge or direct him in his work. . . . The Boston Company had no control over the maintenance of the road. That devolved, under the contract, solely upon the defendant. The sole right which the Boston Company had was a right to use the tracks. The control of the road and the maintenance of the tracks and their charge and control remained in the defendant."

The only remaining reference in the opposing brief upon the question of fellow servants is the editorial note in 37 L. R. A. 61, the sole part of which note applicable to the present question being (Brief p. 63) that a decision in a minor court in Pennsylvania that a trainman hired by one company and bound while on the road of another to obey the orders of a conductor in the employ of the latter, is not thereby made the servant, *pro hac vice*, of the second company, is opposed to the weight of authority.

The question whether, if the decedent and the conductor were at the time of the accident, for any purpose or to any extent, in the employ, pay, or control of separate companies, they were fellow servants, would seem

to be academic merely, in so far as the present case is concerned, no such question being possible under any of the facts shown by the evidence. That, even under such circumstances, the doctrine of fellow-servant applies where the accident occurs in the performance by them of a service to or for the employer of the negligent servant, is maintained by many and highly respectable authorities.

Rourke *vs.* Colliery Co., 2 C. P. Div. 205.
The Harold, 21 Fed. 428.
Railroad Co. *vs.* Cox, 21 Ill. Rep. 20.
Vary *vs.* Railroad Co., 42 Iowa, 246.
Johnson *vs.* Boston, 118 Mass. 114.
Railroad Co. *vs.* Clark, 2 Bradw. 596.
Smith *vs.* Voigt, 176 U. S. 498, 513.
Smith *vs.* Railway Co., 85 Mo. 418.
Hardesty *vs.* Shedden, 78 Fed. 618, s. c. 37 L. R. A. 61.
Clark *vs.* Geer, 86 Fed. 447, 451.
Atwood *vs.* Railroad Co., 72 Fed. 447, 457.
Byrne *vs.* Railroad, 61 Ib. 605.
Railroad Co. *vs.* Berry, 152 Ind. 607.
Railroad Co. *vs.* Groves, 56 Kans. 601, 610.
Barret *vs.* Singer Mfg. Co., 1 Sweeney (N. Y.), 545.
Donovan *vs.* Construction Syndicate L. R. 1 Q. B. Div. 629.
Atlantic Transport Co. *vs.* Coneys, 82 Fed. 77.
Railroad Co. *vs.* Clark, 2 Ill. App. 596.

The decided weight of authority is to the effect that all who are subject to the control and direction of the same master, deriving authority and compensation from a common source, coupled with an engagement in the same general business, are fellow servants.

Wonder *vs.* Railroad Co., 32 Md. 411.
Wood's Master and Servant, sec. 435.
Elevator Co. *vs.* Neal, 65 Md. 438.

The decedent and the conductor were
partment of employment, and, although
fered, engaged in accomplishing the
namely, the moving of cars over the line
Company, and were fellow servants.

Railroad Co. *vs.* Conroy, 175 U. S
N. P. Ry. Co. *vs.* Dixon, 194 U. S

Upon the foregoing considerations, a
thorities, both the trial court and the
held that the doctrine of fellow servan
and, alone, justified the direction of a v
the defendant. An independent groun
to direct was the absence of any sufficie
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trolley down until he receives a signa
the pit. There was no evidence that
customary, that pitmen, the plaintiff's i
were accustomed to give such signals,
the trolley would be held until they
proof of any other observance, custon
which the conductor failed to observ
however, unnecessary to emphasize
this feature of the case.

It is respectfully submitted that th
the judgment below, and that it shou

J. J. DARL
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RLINGTON,
Defendant in Error.

Supreme Court of the United States.

No. 173.—October Term, 1905.

Marian J. Looney, Administratrix of the Estate of James F. Looney, deceased, Plaintiff in Error,
vs.
The Metropolitan Railroad Company and The Washington Railway and Electric Company.

In error to the Court of Appeals of the District of Columbia.

[February 19, 1906.]

Mr. Justice McKenna delivered the opinion of the Court.

Action brought by plaintiff as administratrix of the estate of James F. Looney, deceased, against the defendants, for damages for the death of her intestate, alleged to have been caused by defendants. Judgment went against plaintiff in the Supreme Court of the District of Columbia, which was affirmed by the Court of Appeals.

After the plaintiff had rested her case the court directed the jury to return a verdict for the defendants. The correctness of this ruling is the question in the case.

The declaration consists of four counts. The first three allege the employment of the deceased by each of defendant companies respectively. In the fourth the allegation is that he was rightfully and lawfully in the discharge of his duties.

Looney was employed as a "pitman" by the Washington and Great Falls Railroad Company (now the Washington and Electric Company), and was on the day of his death, July 28, 1901, in one of the "plow pits" located on the lines of the company, near its terminus, at Thirty-sixth street and Prospect avenue northwest.

The Metropolitan Company's line connects at this point with that of the Great Falls line. The latter company uses the overhead system. By this system the power is conveyed to the car by means of a "trolley pole" attached to the top of the car and made to touch the trolley wire when used to propel the car. The Metropolitan Company uses the underground system by means of a "plow," so called, projecting through a slot in the tracks to an underground current. The two companies have a trackage arrangement, whereby the cars of the Metropolitan Company run over the line of the other company. The cars of the Metropolitan Company, therefore, are equipped not only with a "plow" and

mechanism for the underground system, but with a trolley pole and mechanism for an overhead system. To attach these mechanisms to their respective systems it is necessary to run a car over an excavation on the line of the Great Falls Company known as the "pit." The "pitman" is thus enabled to remove the "plow" from a car to be transferred from the Metropolitan line to the Great Falls line, and adjust or attach the wires or "leads" necessary for the operation of the car over the Great Falls line. While doing this Looney was killed, the plaintiff contends, through the negligence of the conductor of the car in permitting the trolley pole to come in contact with the trolley wire, whereby a current of electricity was transmitted to the motive machinery. And this is the ground of negligence charged in the declaration. In every count it is alleged "before said intestate entered said plow pit it became the duty of the defendants, and each of them, to keep, or cause to be kept, the electric current so cut off from said pit as not to injure the said intestate; and the plaintiff says that said intestate having entered said pit in obedience to said direction to him as aforesaid, said defendants negligently failed to keep, or cause to be kept, cut off, as aforesaid, said electric current from said pit while said intestate was therein for the purpose aforesaid, whereby and by reason of said negligence the said intestate was so severely shocked and injured by said electric current that he almost immediately died."

At the trial there was evidence given by the plaintiff of the arrangement between the defendant companies as to the exchange of cars and to the relation of their respective employes. On this evidence the parties base opposing contentions, the defendants contending that the conductor and Looney were fellow servants, the plaintiff contending that they were not. Both of the lower courts sustained the contention of the defendants. The Court of Appeals beside intimated a belief that the testimony on behalf of plaintiff rather tended to show accident than negligence. If this be so, or if the evidence fails to establish whether the death was caused by accident or negligence the judgment should be affirmed, and it will be unnecessary to decide whether Looney and the conductor were fellow servants. We will assume for the purposes of the case that they were not fellow servants.

The accident was seen by two persons, Margaret Mawson and Helen Gertrude Coon. The former testified that she was sitting in her room on the second floor of her house, which is on Prospect avenue, seventy-five feet or more from the "pit." She saw the car turn the curve from Thirty-sixth street into Prospect avenue, and "that the trolley pole was up and the trolley wheel against the overhead wire, all the time after the car got into Prospect avenue until it stopped over the pit; that while the car was coming from Thirty-sixth street down to the pit she saw Looney, the deceased, enter the pit through the south trapdoor. That after the car

stopped over the pit she saw him go up under the car and take the plow off. That after he took the plow off she saw him go up under the car again and put the wires up in the car to connect with the overhead trolley, and that while he was in that position she heard him holler and drop down, and the motorman turned and said 'For God's sake, fix that trolley!' and the conductor then pulled the trolley down, but did not before that time. . . . That the accident did not happen until after the car stopped and the deceased had removed the plow and had gone up under the car again and was putting up the wires. That she saw the movements of the deceased under the car through the trapdoor. That she could see his hands taking off the plow; could see nothing but his hands then; that after he took off the plow and went up under the car, she could see a part of his body above the surface of the street. That the pit was deep enough for a man to stand up in; that she heard no bell ring, nor signal of any sort; her hearing was good enough to hear a bell if one had been rung. That he had to use his hands to remove the plow and also put the overhead current on, and she saw him twist his hands when he got the shock."

Helen Gertrude Coon testified that she was a daughter of the preceding witness and lived with her; that she saw the accident from the front porch of the house, which was about on the level with the sidewalk of Prospect avenue. She saw the car run around the curve from Thirty-sixth street, come down the avenue and stop over the pit. She was not certain whether the pole was touching the wire before the car stopped over the pit, but the pole was touching the wire or came in contact with it while deceased was taking off the plow. "That her attention was directed to the fact of the trolley being in contact with the wire from the fact that the deceased gave a groan, and the motorman said 'For God sake, pull that trolley down!' That some one said 'Pull the car off the pit!' That she saw deceased take the plow off and then go up under the car to throw the overhead current on. That after he took the plow off and was putting the overhead current on, she heard him groan. That she heard no bells or signals given. That he had to use his hands to remove the plow and also put the overhead current on, and she saw him twist his hands when he got the shock. That she saw all this while looking under the car from where she was sitting on the porch. That they took the body up out of the pit over which the car had been standing."

A passenger on the car testified that he heard one bell ring, and immediately the conductor took the rope that holds the trolley rod in his hands, but he did not notice him do anything else. In about a minute and a half there "was a groan down in the hole and he jumped down and saw the man lying on his face." He heard some one say "For God's sake, hold the rod down; pull the pole down!"

Another witness testified that he lived on Prospect avenue, and was in front of his house lighting the fire in his automobile. He did not notice

the car before it stopped. While it was standing over the pit he heard an exclamation and a groan, and some one said "Pull that trolley down!" After the exclamation he looked up and saw the trolley against the wire. He was about seventy-five feet from the car.

Another witness testified as to the manner of adjusting the plow and "leads," and the way a shock could be received by the pitman. It was to the effect that the wires used to connect the motive power with the overhead trolley are called "leads." Where the pitman takes hold of them to adjust them they are insulated by a covering of india rubber, but at the ends where they connect with other wires they are uninsulated and have to be so in order to take the current. If the pitman takes hold of them at the right place and there is no leak, he would not be shocked, even though they were connected with the trolley. "Wear and tear," a witness said who was experienced in removing and adjusting plows and wires, "will cause a leak in the insulation. A leak is when the electricity comes through a hole in the insulation, caused by the wear and tear or from the insulation being old or imperfect."

The same witness also testified "that the company furnishes gloves in the pit with which to handle live plows and wires. But it is not customary or required to use the gloves except upon rainy days. On bright days, the car, when over the pit, is supposed to be 'dead,' and you don't take off the plows with gloves; you can't half do your work with them. That danger from electricity is increased from perspiration, rain or other moisture. That the day of the accident was a bright, sunshiny day. The accident occurred between two and four o'clock P. M."

If the trolley was on before the plow was disconnected and removed, the plow would be charged with the full voltage on the line.

A witness who had experience with the construction of electric railway systems, and was familiar with the action of electricity generally, and had experience in superintending the work of disconnecting a plow from an electric car and adjusting the wires to move an overhead system, testified that in his opinion as an expert that it would be the duty of a conductor to keep the trolley off the wire until he received some signal from the man beneath the car.

(1) It will be observed that the deceased did not meet his death while removing the plow. Of this the testimony leaves no doubt. (2) He received the electric shock while adjusting the leads. It follows from the first proposition that the trolley pole was not in contact with the trolley wire when the plow was removed. The argument of plaintiff assumes the contrary, and, indeed, is based entirely on the assumption that the deceased received his death stroke when removing the plow.

Two questions arise on the second proposition. The leads are insulated except at the ends that go into the connection; they are necessarily unin-

sulated there in order to take the current. But it was not necessary for the deceased to touch the uninsulated parts in making the connection, and unless touched no shock would have been received, even though they had been connected with the current by reason of the trolley being in contact with the wire, *unless there was a leak in the insulation arising from defective construction or wear and tear in use.* Granting, therefore, that the conductor was negligent, one of two things was necessary to cause the accident, a leak in the insulation or the act of the deceased in touching the uninsulated ends of the leads. Either one or the other was a necessary condition. If the first existed, the defendants may be charged with liability. If the second, they are exonerated, The burden of proof becomes a factor. The plaintiff in the first instance is not required to prove that the deceased was free from contributory negligence; in other words, the burder of proof of contributory negligence is on the defendant. But on the other hand, plaintiff must establish grounds of liability against the defendant. To hold a master responsible, a servant must show that the appliances and instrumentalities furnished were defective. A defect cannot be inferred from the mere fact of an injury. There must be some substantive proof of the negligence. Knowledge of the defect or some omission of duty in regard to it must be shown.

In *Texas Pacific Railway Company* v. *Barrett*, (166 U. S. 617,) the plaintiff (defendant in error in this court) was a foreman in charge of a switch engine, and was injured by the explosion of a boiler of another engine. There was evidence tending to prove that the boiler was and had been in a weak and unsafe state by reason of the condition of the stay bolts, and that if a well-known test had been applied the condition of the bolts would have been discovered. The Circuit Court instructed the jury that the mere fact of the injury received from the explosion would not entitle plaintiff to recover; that, besides the fact of explosion, he must show that the explosion resulted from the failure of the railroad company to exercise ordinary care either in selecting the engine or in keeping it in reasonable safe repair. The court also instructed the jury that the burden of proof was on the plaintiff throughout the case to show that the boilers and engines that exploded were improper appliances to be used on its railroad by the defendant; that by reason of the particular defects pointed out and insisted on by the plaintiff the boiler exploded and injured him, and the plaintiff was ignorant of the defects, and did not by his negligence contribute to his injury. Passing on these instructions, this court said, that they laid down the applicable rule with sufficient accuracy and in substantial conformity with the views of this court expressed in prior cases which were cited.

Plaintiff in the case at bar introduced no evidence whatever of a defect in the leads or that leaks were likely to occur, or the amount or degree of

inspection necessary to discover them, or that there was an omission of inspection. The case was probably brought and tried on a different theory. It was argued in this court on a different theory. It was argued on the assumption that the deceased was killed when removing the plow. The assumption is directly in the teeth of the testimony. "The accident did not happen until after the car stopped and the deceased had removed the plow and had gone up under the car again and was putting up the wires." (Testimony of Margaret Mawson.) And to like effect is the testimony of Miss Coon. "She saw deceased take the plow off and then go up under the car to throw the overhead current on. That after he took the plow off and was putting the overhead current on, she heard him groan." And she saw him "twist his hands when he got the shock."

The declaration does not charge a defect in the leads. It charges the negligence to have been in the failure "to keep, or cause to be kept, cut off" the electric current while the deceased was in the pit, "whereby and by reason of said negligence the said intestate was so severely shocked and injured by said electric current that he almost immediately died." In other words, the cause of death was the negligent act of permitting the trolley pole to come in contact with the trolley wire.

But granting plaintiff is not limited by her declaration, nevertheless she has not satisfied the requirements of law in her proof. A plaintiff in the first instance must show negligence on the part of the defendant. Having done this, he need not go farther in those jurisdictions where the burden of proof is on the defendant to show contributory negligence. In other words, if there is no evidence which speaks one way or the other with reference to contributory negligence of the person killed, then it is presumed that there was no such negligence. (Thompson on the Law of Negligence, Sec. 401; *Baltimore & Potomac Railway Company* v. *Landrigan*, 191 U. S. 461; *Texas & Pacific Railway Company* v. *Gentry*, 163 U. S. 353.) But the negligence of a defendant cannot be inferred from a presumption of care on the part of the person killed. A presumption in the performance of duty attends the defendant as well as the person killed. It must be overcome by direct evidence. One presumption cannot be built upon another. (*Douglas* v. *Mitchell*, 35 Pa. St. 440; *Philadelphia etc. Railroad Company* v. *Henrice*, 92 Pa. St. 431; *Yarnell* v. *Kansas City etc. Railroad Company*, 113 Mo. 570.)

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.